THE

MADRAS WEEKLY NOTES

E. 13996

1949

CRIMINAL

REPORTS

Editorial Board:

R. Gopalaswami Iyengar, B.A., B.L.
N. R. Govindachari, M.A., B.L.
N. T. Raghunathan, M.A., B.L., *Editor-in-charge*
S. Srinivasachari, B.A., B.L.
S. Krishnamurthi, BAR-AT-LAW
N. T. Ramanujam, B.A., B.L.

Mode of Citation (1949) M. W. N. Cr.

ALL RIGHTS RESERVED

Table of Cases—1949

First number denotes pages of The Madras Weekly Notes Full Series

PRIVY COUNCIL

Bhagwan Das v. King 755; 207
Bhuboni Sahu v. King 444; 116
Caspersz v. The King 316; 85
Noor Mohamed v. King 437; 109
Phanindra Chandra Neogy v. King 442; 114
Walli Mohammad v. The King 320; 88

FULL BENCH

Nathaniel v. Emperor 93; 21
Thiruvengadasami Naidu v. Mun. Health officer, Karaikudi 237; 61

CRIMINAL

Abraham v. King 838; 216
Akkiraju Sanyasi v. The King 278; 78
Alagiriswami Naidu v. Veerammal 115; 43
Appalaswamy v. King 756; 208
Appanna v. Appalaraju 631; 184
Bavaji v. The King 632; 165
Benniah v. The King 514; 130
Bhimaraju v. The King 284; 84
Brahmayya v. King 281; 81
Calicut Hosieries v. King 842; 220
Chelliah v. The King 186 58
Dasappa v. District Magistrate South Kanara 547; 139
Ethirajulu Naidu v. King 840 (1); 218 (1)
Ganesan v. The King 516; 132
Gopalan v. The District Magistrate, Malabar 105; 33
Gopalan v. King 840 (2); 218 (2)
Govindaswami v. King 572; 164
King v. Andi Thevan 172 (2); 60
King v. Muthiah Thevan 182; 54
King v. Parameswarayya 12; 4
Lakshminarayana v. King 831; 209
Mani v. District Magistrate, Mathurai 549; 141
Mistry v. The King 349; 93
Mohammed Ibrahim Maracayar v. Ismail Maracayar 323; 91
Munuswami Naicker v. Kanniappa 837; 215
Muruga Goundan v. The King 187; 59
Narayana v. Rudrayya 844; 222
Narayanaswamy Naidu v. Inspector of Police Mayavaram 518; 134
Natesan v. The King 175; 47
Om Prakasha Gupta v. King 448; 121
Padmaraja Shetty in Re 642; 175
Papayyaswamy v. King 452; 124
Paramban Mammadu v. King 634; 167
Public Prosecutor v. Gopalaswami Pillai 451; 123
Public Prosecutor v. Desigan 280; 80
Public Prosecutor v. Nagamma 571; 163
Public Prosecutor v Nagappa Pujarry 14; 6
Public Prosecutor v. Sriranganayakulu 282; 82
Public Prosecutor v. Thippayya 103; 31
Rajagopala Rao v. King 751; 203
Rajagopalachari v. King 834; 212
Ramaswami Chettiar v. King 545; 137
Ramaswamy Chetty v The King 16; 9
Ramiah v The Chief Secretary to the Govt. of Madras 509; 125
Sheik Khader Sahib v. The King 512; 128
Sreenivasan In re 277; 77
Subba Rao v. King 450; 122
Subbaratnam In re 17; 9
Sundararajalu Chetty v The King 250; 74
Thathi Reddi v. The King 15; 7
Tonse v. The King 173; 45
Varadadesikachariar v. The King 649; 182
Veerabhadrayya v. King 733; 185
Velayuda Mudali v. The King 27; 19
Venkatachalam Chetty v. Ramaswami Chetty 184; 56
Venkatachala Udayan v. Executive Officer Kasipuram Pan Bd. 546; 138
Venkataraman v The Commr. of Police 9; 1
Wahid v. The King 324; 48

The Madras Weekly Notes

CRIMINAL

1949 REPORTS 1949

Cr. M. P. No. 1910 of 1948

October 27, 1948

SUBBA RAO & MACK, JJ.

M. R. VENKATARAMAN
v.
THE COMMISSIONER OF POLICE, MADRAS and the Supdt., Central Jail, Vellore.

Madras Maintenance of Public Order Act (I of 1947), Ss. 2 (1) & (2), 3 & 4—Order valid—Non-compliance with other provisions of Act—Effect.

Once an order has been passed in strict compliance with the provisions of s. 2 (1), it is validly passed. Ss. 2 (2) and 3 (1) are designed to provide a machinery for the person against whom the order has been passed to seek redress as early as possible. If a statutory authority did not comply with the provisions of s. 2 or s. 3, there may be other remedies open to the aggrieved party. But the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under s. 2 (1) cannot in law invalidate an order validly passed under s. 2 (1); nor make the further detention illegal.

Under s. 2 (1) the authority must be satisfied that a person is acting or is about to act in a manner prejudicial to public safety. The antecedent conduct would certainly afford data or furnish reasonable grounds in finding out the present attitude of the person concerned.

I. L. R. 1947 Nag. 579, ref. to.

Petition under S. 491 Cr. P.C. praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* that the petitioner be brought before this Hon'ble Court to be dealt with according to law and be set at liberty forthwith.

A. K. Pillai for Messrs. Row & Reddy for the petitioner.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER

(SUBBA RAO, J.)

This is an application under S. 491 Cr.P.C. The petitioner is an advocate of this Court. On the 1st April 1948 the Commissioner of Police passed an order of detention under S. 2 (1) (a) of the Madras Maintenance of Public Order Act, (Act I) of 1947. He was duly authorised by the Provincial Government to exercise its powers under S. 2 (1) of the said Act. In the detention order it is stated that the petitioner is acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it is necessary to detain him. The Commissioner of Police communicated the said order to the Government under S. 2 (2) on the 9th June 1948. On the 11th September 1948 the Government served the grounds of detention on the petitioner. Though the order of detention was passed on 1st April 1948, the petitioner was arrested only on 17th August 1948 as presumably his whereabouts were not known till that date.

Mr. A. K. Pillai, learned counsel for the

petitioner, raised before us the following four points (1) that the order of the Commissioner dated 1st April 1948 was invalid; (2) that though the order was valid when passed, it became invalid in view of the non-compliance with some of the mandatory provisions of the statute; (3) that though the detention in its origin was valid the detention of the petitioner subsequent to the contravention of the mandatory provisions of the statute was illegal; and (4) that the Government in detaining the petitioner was actuated by mala fides.

There is no force in the learned counsel's first argument. S. 2 (1) reads as follows:—

"The Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order:—

(a) directing that he be detained......"

As aforesaid this power of the Government was delegated to the Commissioner under S. 15 of the Act. The Commissioner states in the detention order in clear terms that the petitioner is acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing it is necessary to detain him. The order is in strict compliance with the provisions of S. 2 (1) and is therefore clearly valid.

There are no merits in the second point either. If the order was valid at its inception, we cannot see how it would become invalid by the subsequent non-compliance with the other provisions of the Act. The argument was that the order passed under S. 2 (1) was not complete till it was communicated to the Government in strict compliance with the provisons of S. 2 (2). By sub-sec. (2) when any order is made under sub-sec. (1) by an officer or authority empowered under S. 15, that officer or authority shall forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and such other particulars as, in the opinion of such officer or authority, have a bearing on the necessity for or expediency of the order. Though the order of detention was passed on 1st April 1948, the Commissioner communicated the same to the Government on 9th June 1948, i.e. after ten weeks. In Cr. M.P. 1309 of 1948 we differed on the interpretation of the word 'forthwith' in the said section. Assuming that in view of this enormous delay, it must be held that the provisions of the section have not been strictly complied with, would it have the effect of invalidating an order that had been validly passed. We think not. Once on order had been passed in strict compliance with the provisions of S. 2 (1), it was validly passed. Ss. 2 (2) and 3 (1) were designed to provide a machinery for the person against whom the order has been passed to seek redress as early as possible. If a statutory authority did not comply with the provisions of S. 2 or S. 3, there may be other remedies open to the aggrieved party. But in our view, the non-compliance with the provisions prescribing a procedure to get redress by the aggrived party against whom an order has been passed under S. 2 (1) cannot in law invalidate an order validly passed under S. 2 (1). In support of his argument Mr. Pillai cited the decisions in *Radha Rai* v. *Emperor* (1) and *Abdul Jabbar* v. *Emperor* (2). In our view those decisions have no bearing on the question to be decided in this case.

We do not also agree with the third contention of the learned counsel for the petitioner. The argument of Mr. Pillai was that assuming the order passed under S. 2 (1) was valid at its inception and continued to be so, the further detention after the violation of the provisions of S. 2 (2) was illegal. This argument ignores the distinction between the order of detention and the procedure prescribed for enabling the aggrieved party to seek redress. The petitioner, as we found, was legally detained under S. 2 (2) of Madras Act I of 1947. Under S. 4 of the Act this order of detention shall be in force for six months from the date on which it is confirmed or modified under sub-sec. (5) of S. 3. If the authority concerned did not carry out his statutory duties, the petitioner could have taken the appropriate remedy to compel him to perform his duty. He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned. But in our view the non-compliance with the provisions of sub-sec. (2) to S. 2 could not make the detention illegal. In any view as the order was communicated to the Government and the grounds for detention were duly

1. (1911) 11 I.C. 162
2. (1935) A.I.R. Cal. 251

served on the petitioner, it would be impossible to hold that the detention of the petitioner at present is invalid.

We cannot also accept the learned counsel's last argument. Paragraph 16 of the petition puts the petitioner's case briefly:

> "I submit that my detention is mala fide actuated by feelings of political animosity and made solely with the political intent of stifling the voice of all democratic opposition. I am kept in detention only because I fearlessly campaign for the common people. This is not liked by the vested interests and the Ministry which is theirs".

This idea is elaborated in greater detail in the other paragraphs of the petition. The learned counsel argued that we should infer malafides from the long delay in communicating the order of detention to the Government. Malafides is a state of mind. If a person is detained and with a view to prevent him from taking steps to get redress from the Government, if the appropriate authority intentionally delays the communication of the said order to the Government, it is possible to infer or attribute malafides to the authority concerned. But in this case there is one important fact which negatives any such intention on the part of the Commissioner. The order of detention was passed on 1st April 1948 and it was communicated on 9th June 1948. But the petitioner was arrested on 17th August 1948. On these facts it is impossible to attribute malafides to the Commissioner as his order was communicated long before the petitioner was arrested.

It was further contended by Mr. Pillai that the grounds served upon his client could not sustain an order under S. 2 (1) and therefore we must attribute malafides to the Government. He argued that except the last ground all the other previous grounds related to his client's antecedents which are not permissible grounds for passing an order under S 2 (1) of the Act. The last ground according to him does not support the statement made by the Commissioner that the petitioner is acting in a manner prejudicial to the maintenance of public order. If we accept this argument we would in effect be ignoring the recent Full Bench decision. The Commissioner on the material before him was satisfied that the petitioner was acting in a manner perjudicial to public safety. Under sub-sec. (2) to S 2 he reported to the Provincial Government the said order with the grounds on which it has been made and other particulars Under sub-sec (3) the Government communicated the grounds to the petitioner. It will be seen that under S. 3 the Government is not bound to disclose to the petitioner all the material that was placed before them. It is therefore not possible for the Court to see the entire material on which the Commissioner was satisfied that the petitioner was acting in a manner prejudicial to public safety. Even the grounds communicated to the petitioner disclose material on which the Commissioner could reasonably satisfy himself that a case was made out for detention. It is not permissible for the Court to go into the correctness or otherwise of the facts or canvass the grounds for detention. The antecedents and the present activities of the petitioner were given in the grounds. They afford sufficient material for a competent authority to come to a conclusion one way or the other. Mr. Pillai argued that the last ground does not say that the petitioner is acting, but only says that the communist party is indulging in violent subversive activities and it is likely that he will also indulge in violent subversive activities. But the Commissioner certainly was entitled to infer from the said fact that the petitioner who is the present secretary of the Tamil Nad Provincial Committee of the Communist party was also acting in a manner prejudicial to public safety. But as we have already stated this is only one of the grounds. There might have been other material which was not disclosed to the petitioner

We cannot also accept the argument of the petitioner that in no circumstances the antecedent conduct of a detenu could be taken note of by the concerned authority to satisfy himself whether he is acting or is about to act in a manner prejudicial to public safety. It is no doubt true that under S. 2 (1) of the Act, the Government or the delegated authority must be satisfied that a person is acting or is about to act in a manner prejudicial to public satefy. But the antecedent conduct would certainly afford data or furnish reasonable grounds in finding out the present attitude of the person concerned Learned counsel for the petitioner relied on a decision in *Om Prakash Mehta* v. *King Emperor* (3). That was a decision under the Central Provinces and Berar Maintenance of Public Order Act, 1946. The operative portion of S. 2 (1) of the said

3. (1947) I L R. Nag. 579

Act reads as follows :—

> "The Provincial Government if satisfied that any person is acting in a manner prejudicial to the public safety, order, or tranquility, or is fomenting or inciting strikes with intent to cause or prolong unrest among any group or groups of employees may if it considers such order necessary make an order (a) directing that he be detained."

There is a material difference between the provisions of that section and S. 2 (1) of Madras Act I of 1947. In the latter section the Provincial Government can detain a person not only when he is acting but also when he is about to act in a manner prejudicial to public safety. The learned Judges in construing that section held that detention could not be ordered on the basis of past actions. But they observed at page 597 as follows :—

> "The bulk of the acts which are said to constitute the "acting" consist of past acts, but in each case there is included some overt act done after the 21st of November 1946 on which date the Act came into force. The series of acts so set forth convey the sense of continuity which the Act requires and the inclusion of an overt act done after the 21st of November 1946 imports that the said acting was continued after the datum line. These statements, combined with the reference in the order to S. 2 (1) (a) of the Act, are sufficient to show that the "satisfaction" relates to a continuous course of conduct which was persisted in after the coming into force of the Act."

The grounds here also disclose that the petitioner continued to indulge in subversive activities even after the Act came into force. He is a prominent member of the Communist party. He took part in various communist activities and had even gone underground. He was detained on the previous occasions. He was charged with responsibility for many violent acts including murder, looting arson and other grave offences which have taken place in Madras in 1947. He had participated in secret meetings held on 3th December 1947 and 7th January 1948 and drew up the programme of the party. The Communist party to which he belongs, according to the last ground, is now indulging in violence and subversive activities and most of the members of the party have gone underground and from there, they are guiding various crimes such as arson, loot, murder, etc. On these facts and presumably some others which are not disclosed, the Commissioner was satisfied that the petitioner was acting in a manner prejudicial to public interests. We cannot say on the said material that no reasonable man could be satisfied that the petitioner was acting in a manner prejudicial to the maintenance of public order.

After judgment was reserved, Mr. Pillai requested us to allow him to cite some cases in support of his contention that the order passed under S. 2 (1) of the Act was invalid as it was not forthwith communicated to the Government under S. 2 (2) We allowed him to do so. In addition to the cases cited by him, he wanted to raise a new plea for the first time viz. that the Commissioner of Police had no authority to pass an order of detention under S. 2 (1) as the order of the Provincial Government empowering him to exercise the powers under S 2 (1) had expired by the time he issued the order under the said section. This objection was not taken in the petition nor was it addressed to us before judgment was reserved As the validity of this objection would depend upon certain facts and as it was not raised before judgment was reserved, we did not allow the advocate to raise this plea.

This application is therefore liable to be dismissed and it is accordingly dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 635 of 1948
Case Ref. No 38 of 1948
November 3, 1948
GOVINDA MENON, J.

THE KING
v.
K. V. M. PARAMESWARAYYA

Cr P. C. (V of 1898), Ss. 403, 436 & 437—Discharge for serious offence and conviction for lesser offence—Further inquiry.

A charge sheet was filed against the accused for an offence under s. 307, I.P.C. The magistrate was of opinion that the offence on the evidence placed before him was one under s. 337, converted the preliminary register case into a calendar case and convicted the accused under s 337, I P.C.

Held *the action of the magistrate amounted to a discharge of the accused of an offence under s. 307 ; that it was open to the district magistrate either to order a further inquiry under s 436 or to order commitment to the court of session; and that s. 403 Cr.P.C., was no bar to the trial for the offence under s 307 I.P.C.*

Case referred for the orders of the High Court, under S. 438 Cr. P. C. by the District

Magistrate of South Kanara, in his letter Ref. C. No. 3752/48/C3 dated 26—6—1948.

Public Prosecutor (*V.L. Ethiraj*), for Crown

ORDER

This is a reference by the District Magistrate of South Kanara requesting this court to set aside the conviction of the accused under S. 337 of the Indian Penal Code by the Stationary Sub-Magistrate, Puttur, in C. C. No. 352 of 1948 and to order a further enquiry against the accused for an offence under S. 307 Indian Penal Code which, according to the evidence adduced, is, in the opinion of the District Magistrate, the offence committed by the accused. My learned brother Rajagopalan, J., in issuing notice to the Public Prosecutor, made the following observation:—

> "Rule 269 Criminal Rules of Practice has not been complied with. There was no call for an explanation from the Sub Magistrate by the District Magistrate. No doubt it is unlikely the Sub Magistrate will have anything to add to the lengthy explanation he furnished to the S. D. M.
>
> It is virtually a question of appreciation of evidence mainly of oral evidence.
>
> Notice may be ordered to the P. P. and the case posted before a single Judge."

After the entire records were translated, the matter now comes up for passing orders.

The charge-sheet filed against the accused was for an offence under S. 307 I P.C., in that he attempted to murder his son P.W. 1 by shooting him with a single barelled muzzle loading gun at a distance of 8 yards with such intention or with such knowledge and under such circumstances that if, by that act, he had caused the death of P.W. 1 the act would have amounted to murder.

Fifteen witnesses were examined on the side of the prosecution and two for the defence. Though the inquiry originally began as a preliminary register case, during its progress, the Sub Magistrate was of opinion that the only offence that was committed on the evidence placed before him was under S. 337 of the Penal Code and thereafter a charge was framed under that provision of law and the accused further questioned. Accepting in part, the statement of the accused and the evidence of the two witnesses examined for him the court of first instance convicted him of an offence as stated above and sentenced him to pay a fine of Rs. 200-0-0. The Sub Divisional Magistrate of Puttur, on perusing the calendar of this case in his administrative capacity called for a report from the Sub Magistrate on the various questions raised by him and wanted the Sub-Magistrate to state why the case was converted as a calendar case and the accused convicted only of a minor offence. In answer to this, the Sub-Magistrate submitted a lengthy explanation stating the reasons for the course adopted by him. He also expressed his conclusion regarding the credibility of various portions of the prosecution evidence and why the whole of it should not be accepted. The Sub Divisional Magistrate was not satisfied with the explanation and therefore submitted the papers to the District Magistrate who, after expressing his view, has referred the whole matter to this Court.

My learned brother, Rajagopalan, J. has not issued notice to the accused at all and in the circumstances if I were inclined to agree with the expression of opinion made by the Sub Divisional Magistrate and the District Magistrate, under S. 439 cl. (2) Criminal Procedure Code it would not be legally possible for this Court to pass any order to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader. Such being the case, I have to issue notice to the accused before passing an order to his prejudice, but for reasons which will be given presently, it seems to me that no further action is necessary in this case.

When the Sub Magistrate framed a charge under S. 337 I.P.C and did not frame one under S. 307 I.P.C., his action amounted to a discharge of the accused of an offence under the latter section. In that case it is open to the District Magistrate under Ss. 436 and 437 Cr.P.C either to order a further enquiry or to order commitment to the Court of Session. The fact that the Court of first instance has convicted the accused of an offence under S. 337 I.P.C., will not, in any way, interfere with the order of discharge under S. 307 I.P.C.

S. 403 Cr.P.C. is clear to the effect that the conviction or acquittal of a person of a minor offence is no bar to the further trial of the same person for a more serious offence which might include the ingredients which already constituted the offence under the minor section. The facts and circumstances which according to the Court of first instance constituted the offence under S. 337 I.P.C. along with other ingredients might constitute an offence under S. 307 I P.C., and there is no prohibition in law in trying the accused for the more serious offence, the conviction under S. 337 I.P.C., not being a bar. The District Magistrate, if he had been so inclined,

could have himself ordered a further enquiry for the offence under S. 307 I.P.C., instead of making the reference which is the subject-matter of discussion now.

But the learned Public Prosecutor contends that as the case depends mostly, if not solely, on the appreciation of oral evidence, it is very unlikely that on the evidence as it stands, any Court will come to a conclusion that the accused will be guilty of an offence under S. 307 I P.C. He places particular reliance on the evidence of P. Ws 12 and 13 and contends that since injuries Nos. 13 and 14 could only be caused by the bullet striking against something and deflecting at an angle to the right or to the left, not necessarily at right angles, it would be impossible that a shot fired at such a close range as 8 yards would have been the cause of the injuries on P. W. 1. The evidence of P. Ws. 12 and 13 is clear that the injuries could be caused by one gun-shot passing through a window within a range of 24 feet. According to the learned Public Prosecutor, if the gun was fired at such a short distance, there could not have been this deflection. Moreoever it is pointed out by the learned Public Prosecutor that there are other infirmities in the prosecution evidence which the court of first instance had rightly taken into consideration. I am inclined to agree with these contentions. I would therefore hold that no further action is necesary. The records are returned to the District Magistrate, South Kanara.

N.T.R.

Cr. App No. 453 of 1948

October 5, 1948

SUBBA RAO & MACK, JJ.

THE PUBLIC PROSECUTOR

v.

NAGAPPA PUJARY & others

Borstal Schools Act (Mad. Act. V of 1926) S. 8—Scope of.

S. 8 Borstal Schools Act must be interpreted to mean that whenever an adolescent is convicted of an offence, ordinarily he should be given the advantage of being put in a Borstal School so that by long association and training he would come out after the termination of stay as a useful citizen of the country.

Appeal under S. 417, Cr.P.C. 1898, against the acquittal of the aforesaid accused Nos. 1 to 3 of offence under S. 302 I.P.C., by the Sessions Judge of South Kanara Division in S. C. No. 7 of 1948 on his file.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Applt.

Md. Hibbathulla, Amicus Curiae, for Accd.

JUDGMENT

SUBBA RAO, J.:—This is an appeal by the crown against the acquittal of the accused 1 to 3 under S. 302 of the Indian Penal Code. The learned Public Prosecutor argued that on the facts the first accused should have been convicted under Part I of S. 304. But on the facts as found by us he rightly conceded that the offence should fall more appropriately under S 335. There is no particular reason why a differentiation should be made between the first accused and accused 2 and 3 They combined together and beat the deceased, and the evidence does not show that the first accused gave any particular blows which caused the death of the deceased. Indeed the evidence shows that he beat the deceased on the head, whereas the medical evidence shows that the deceased did not die of the wounds on the head Further it is also in evidence that the rice pounder M. O. 3 was broken into two pieces, and it is impossible to say who used the other bit and with which bit the major wounds were caused We therefore modify the sentence of the first accused also and convict him under S. 335 of the Indian Penal Code and sentence him to the period already undergone.

Before we close the judgment, it is necessary to make an observation in regard to the view expressed by the Sessions Judge on the scope of S. 8 of the Madras Borstal Schools Act The learned Judge observed as follows:—

> "The first accused is a lad who, according to his own statement, is aged 16 years, and according to the medical evidence is aged between 16 and 18. There is no evidence that he has criminal tendencies or bad associations He evidently committed the offence under provocation and in the heat of passion and not on account of any Criminal tendencies. I do not consider, therefore, that S. 8 of the Madras Borstal Schools Act can be properly applied to him."

The condition precedent to the application of S. 8 is that the adolescent offender should have criminal habits or tendencies or association with persons of bad character. If the learned Judge's interpretation of that section were to be accepted, it would mean that a person who has no criminal tendencies would be sent to the ordinary jail, whereas a person with criminal tendencies will be sent to the Borstal School. This interpretation would defeat the object of the Act itself. If a person without criminal tendencies is sent to a jail there is a greater danger of his contamination

by his association with hardened criminals, whereas the object of the Act is to send such people to a Borstal School, so that they may have good training and come out of it to become useful citizens The words "criminal tendencies" should not be given a narrow interpretation. If a boy had no criminal tendencies he would not be convicted for any crime at all. The fact that the boy is convicted for one offence or other under the Indian Penal Code shows in the view of the court convicting him that he has criminal tendencies. We would interpret the section to mean that whenever an adolescent was convicted of an offence ordinarily he should be given the advantage of being put in the Borstal School so that by long association and training he would come out after the termination of the stay as a useful citizen of the country,

The appeal is dismissed.

Mack, J.:—I should like to add a word while in substantial agreement with my learned brother about the scope of S 8 of the Madras Borstal Schools Act. I share his opinion that there has been a tendency to narrow down the scope of the Act to adolescents who have been shown to have previous criminal tendencies or bad associations. A criminal tendency does not manifest itself only in acts involving dishonesty such as theft, or cheating. A person who, owing to lack of self-control or as the result of his environment, is unable to restrain himself and commits an offence of either grievous hurt or homicide by using a deadly weapon without regard to consequences exhibits a criminal tendency just as much as a person who steals. The alternative to applying the Borstal Schools Act to cases such as these, as my learned brother has said, is to send him for a long period to an ordinary jail. It is difficult to lay down hard and fast conditions as to the type of adolescents who should be sent to a Borstal School We can think of no cases in which an adolescent should be sent for a long period to an ordinary jail in which he cannot with better advantage to himself and the community at large be sent to a Borstal institution.

N.T.R. —— *Appeal dismissed.*

Cr. R. C. No. 109 of 1943
Cr. R. P. No. 104 of 1948

November 17, 1948

Rajagopaln, J.

THATHI REDDI & others
v.
THE KING

Gaming Act (Mad. Act III of 1930*), Ss.* 3, 6 *& 8—Common gaming house—Presumption—Ingredients under s. 8.*

Where apart from the fact that card and money were found with the petitioner when the police raided the premises there was the fact that the petitioners were not residents of that house and had no acceptable explanation for their presence in the house.

Held *the petitioners were guilty of gaming in a common gaming house.*

The presumption permitted by s. 6 Gaming Act can be drawn only to establish that the house in question was a common gaming house It cannot be extended further to establish without further evidence that a specified person was the owner or keeper of that common gaming house.

Petition under Ss. 435 and 439 Cr P. C. 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate of Madanapalle dated 6—12—1947 in C. A, 164 of 1947 preferred against the order in C. C No. 762 of 1947 Stationary Sub Magistrate of Piler.

A. Bhujanga Rao, for Petr.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

JUDGMENT

All the petitioners were convicted under S. 9 of the Madras Gaming Act, 1930. A-4 was in addition convicted under S. 8 of that Act. Before any conviction could be ordered under either of these two sections it must certainly be proved that the premises in which these persons were found gaming was a common gaming house within the meaning of S. 3 of Act. The learned Magistrate relied to a considerable extent on the presumption prescribed by S 6 of the Act. "Any cards, dice, etc. found in the place...shall be evidence that such a place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Police Officer or any of his assistants". There could be certainly no denying the fact that cards and money were found with the petitioners and obviously they were playing a game of cards for stakes. There was gaming but the question is, was it gaming in a common gaming-house Were that the only piece of evidence that cards and money were found with the petitioners, S. 6 would justify the application of the presumption that the petitioners were gaming in a common gaming-house. That was the scope of the decision

in *Alagappa Chettiar v. Emperor* (1). Walsh, J. observed :

> "At the best the omission of these words can only mean that in spite of there being no evidence to the contrary the Court need not accept them as conclusive evidence but it cannot mean that the prosecution cannot succeed without calling other evidence".

The learned Advocate for the petitioners referred to *In Re Kaza Satyanarayana* (2). But there was a specific finding by the learned Magistrate on the entire evidence on record that the accused were not deriving any profits by running the gaming house. I am unable to see anything in that decision to conflict with the principles laid down in *Alagappa Chettiar* v. *Emperor* (1).

In this case apart from the fact that cards and money were found with the petitioners when the police raided the premises there was the fact that the house was one occupied by Kanakaratnamma The petitioners including A-4 admitted that they were not the residents of that house. Their explanation for their presence there failed to find acceptance at the hands of the courts below. From this fact, in addition to the fact that they were found gaming the learned Magistrate rightly held that the evidence on record amply proved the case for the prosecution, that these petitioners were gaming in a common gaming-house The conviction of the petitioners under S. 9 is confirmed. The sentences are not heavy.

The conviction of A-4 under S. 8, however, stands on an entirely different footing. The presumption permitted by S. 6 can be drawn only to establish that the house in question was a common gaming-house. It cannot be extended further to establish without further evidence that a specified person was the owner or keeper of that common gaming house. There was really no acceptable evidence that A-4 was the owner of the house in question or even that he was keeping or using such a house for gaming. To reiterate, the case for the prosecution itself was that one Kanakaratnamma occupied that house. Even if A-4 was her lover that does not necessarily establish that he occupied that house along with Kanakaratnamma. In the absence of evidence to prove that A-4 did derive any profit from the gaming he cannot be convicted under S. 8. The reasoning of the learned Magistrate that as A-4 had only a small amount of money with him when the Police raided the house, that sum of money must represent the profits A-4, derived from the gaming, fails to commend itself to me. The conviction of A-4 under S. 8 is set aside and is directed to be acquitted of that charge. The fine imposed under that section, if collected shall be refunded to A-4.

N.T.R. —— *Conviction setaside.*

1. (1932) M.W.N. 641; Cr. 120
2. (1940) M.W.N. 8; Cr. 8

Cr. R. C. No. 1259 of 1947
Cr. R. P. No. 1145 of 1947
October 28, 1948
GOVINDA MENON, J.

RAMASWAMI CHETTY
v.
THE KING

Cr.P.C. (V of 1898), s. 423 (1) (b)—Appellate court ordering retrial and trying itself—Legality.

Petitioner was convicted of an offence under s. 417 read with s. 511 Penal Code. On appeal the appellate court held that the offence amounted to an offence under s. 471, read with s 511 Penal Code. On appeal, the appellate court held that the offence amounted to an offence under s. 471, which the trial court was not competent to try, ordered that the accused should be retried by the appellate court itself.

Held, *that the order was legal.*

If under s. 423 Cr.P.C. the appellate court can commit a case to the court of session or direct its trial by a competent court subordinate to it, it necessaily follows that under s 528 Cr.P.C., the superior court is empowered to transfer the case to itself for trial. And this is what the appellate court has done.

Petition under Ss. 435 and 439 Cr. P. C. 1898, praying the High Court to revise the order of the Court of the City First Class Magistrate of Madura dated 31—10—1947 and made in C.A. No. 39 of 1947 (C.C. No. 1927 of 1947, Sub Magistrate Court, Madura Town).

V. Meenakshisundaram, for Petr.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

The petitioner was convicted by the Court of the Sub Magistrate, Madura Town, of an offence under S, 417 read with 511 of the I.P.C. and directed to be released under S 562 (1) of the Cr. P. C. on his own bond for Rs. 500, to appear and receive sentence within the period of one year and in the meantime to be of good behaviour. On appeal, the City First Class Magistrate, Madura, found that the offence committed on the facts and circumstances placed before the court was, not one of

attempt to cheat but would amount to an offence under S. 471 of the I.P C. viz., using as genuine a forged document. On this finding, the appellate court holding that the trial court was not competent to try the offence under S. 471 I.P C, ordered that he should be retried by the appellate Court itself, as a First class Magistrate and it is this order that is now sought to be revised at the instance of the accused petitioner.

The first point argued by Mr. Minakshisundaram is that it is not open to the appellate court to direct the trial of the case by itself for the offence under S. 471 I P C, because the necessary result of the framing of a charge by the trial Court under S. 4 7 I.P.C., read with S. 511 I.P.C, is the discharge of the petitioner of an offence under S. 471 I P.C. That being so, unless that discharge is set aside by proper proceedings it is not competent for any other Court to take cognisance of the offence. Secondly, it is urged that in any event the appellate court ought not to have directed the trial of the offender by itself, because it has already practically formed an opinion against the accused on the merits of the case The case against the petitioner as put forward in the Court of first instance is that he wrote three letters Ex. P. 2, and P-3 purporting to have been written by one Mr. Venkatramier requesting the issue of a free pass in the buses of T. V. S Company, Madura, in favour of the petitioner, as he was a Congress worker doing propaganda work in Nilakottai. The ostensible writer of these letters, Venkataramier denied having written any such letter and therefore it was that the appellant was charged with the offence of attempting to cheat.

The lower appellate court has relied upon the decision in *Emperor* v. *Manikka Gramani* [1] for holding that it has jurisdiction to try the case itself on the ground that the provisions of S. 423 (1) (b) do not preclude an Appellate Court, when it reverses the finding and sentence under appeal, from trying the offender itself, if the offence is one ordinarily triable by it. In such cases, the Appellate Court takes cognisance under s. 190 (b) and not s. 190 (c). Mr. Minakshisundaram contends that this decision cannot be applied to the facts of the present case and even if it is so it requires reconsideration. No authority of this Court questioning the correctness of the judgment of Benson, J mentioned above has been brought to my notice. It has stood the test of the time and has been in vogue for more than 40 years and there are no circumstances which would justify me in coming to a conclusion other than what the learned Judge did. If under s. 423 Cr P.C. the appellate Court can commit a case to the Court of Session or direct its trial by a competent court subordinate to it, it necessarily follows that under s. 528 Cr. P C., the superior court is empowered to transfer the case to itself for trial What the appellate Court has now done is practically to incorporate both the orders in the one, viz. sending the case for trial to some competent subordinate Court and then transferring it to itself. There is nothing wrong in the lower appellate Court holding that the petitioner should be tried by itself.

But the real question in the case is whether on the facts placed before the lower appellate Court, there is sufficient material for holding that the petitioner is guilty of an offence under s. 471 I.P C. viz, using as genuine any document which he knows or has reason to believe to be a forged document. It is no doubt true that the document was not written by the person by whom it purports to have been written. But the mere fact that the petitioner was found in possession of a forged document would not show that he knew or had reason to believe that it was a forged document. Having carefully gone through the evidence in the case, I am not satisfied that there are sufficient materials on record to hold that the petitioner knew that the letters produced by him were forged ones Under the circumstances, I find it difficult to hold that any useful purpose will be served by a re-trial of the petitioner for an offence under s. 471 I.P.C. The order of the lower appellate Court directing a re-trial is set aside and the revision petition is allowed The order of the trial Magistrate is therefore restored.

N.T.R. — *Petition allowed*

Reference No. 1 of 1948

Cr. App. Nos 163 to 167, 66, 67, 131, 64, 65, 132, 68, 69 & 133 of 1948

August 18, 1948

GOVINDARAJACHARI & MACK JJ.

SUBBARATNAM & others In re.

Cr.P.C. (*V of* 1898) *ss.* 154, 162, 226 & 227—*Framing of charges—Inclusion of minor charges—Alteration in sessions court—Power of—Police General diary—Contents Rough notes of statements to police—Use of.*

1. (1907) I.L.R. 30 Mad. 228

A trial judge at sessions is not bound by the charges framed in the committing court and he has ample power to revise and alter them not only at the commencement of the trial under s. 226 Cr.P.C. but also under s. 227 Cr.P.C. at any stage of the trial before the verdict of the jury is returned or the opinion of the assessors are recorded.

There is no necessity for a sessions trial to be cumbered by a medley of minor charges, particularly in a rioting case in which the overt acts constitute evidence of participation in the riot.

Where all the accused are charged under s. 147, I.P.C. with forming themselves into an unlawful assembly with the common object of committing arson, a separate charge of abetment is wholly unnecessary.

Sessions judges should clearly record in their findings the offence of which they find a person guilty and also the section of the Penal Code.

In view of Police Standing Order No. 696 there is no need to enter in the general diary details of complaints already given in the F. I. R. book.

S. 162 Cr.P.C. does not impose an obligation on an investigating officer to produce all his rough notes and jottings out of which he writes his case diary. All that an accused is entitled to demand is that when a written record is kept of the statement of the witness to an investigating officer he shall be entitled to a copy of that record.

1947 *M.W.N.* 209: *Cr.* 37 explained and followed.

Reference under s. 307, Cr. P. C. by the assistant sessions judge of the court of sessions Trichinopoly in case Nos. 28 and 50 of the calendar for 1947 etc.

Public Prosecutor (V.L. Ethiraj) for Crown.

N. Somasundaram, V. Rajagopalachari, P.S. Kailesam, K. Ramachandra Row, G. Baluparameshwari Rao & P.Suryanarayana, for accused.

JUDGMENT

MACK, J.: We have heard several batches of appeals which arise out of grave riots in Karur on 20-7-1946 in the course of which arson was committed in several buildings, and the movables therein including two motor cars jutkas, bales of yarn, handloom goods, iron safes etc. ware burnt by a frenzied mob composed mainly of weavers who got completely out of hand. We are particularly concerned in these appeals with the family of Mariappa Mudaliar who had a handloom weaving factory in the Coimbatore Road in which he had 140 looms worked by weavers for wages. In the bypass road which takes off to the south almost opposite his factory building, in a portion of which he also resided with his family, there were three other buildings occupied by his brother's sons, Arumugam and Subramaniam and his brother-in-law Manikka Mudaliar. Mariappa Mudaliar had a garage and stable adjoining these buildings in which he kept his Ford car, three jutkas and two horses. His factory and all these buildings including two motor cars, one belonging to Arumugha Muduliar, were set fire to by a mob in the course of the day.

There was three separate Sessions cases out of which all these appeals arise in which several accused were separately tried on charges of rioting, arson and kindred offences in respect of the buildings of Mariappa Mudaliar, Arumugha Mudaliar and Manicka Mudaliar. Separate trials were found necessary in view of the personnel of the accused not being the same though several were common to all cases. There were in addition two other Session Cases arising out of arson in two other buildings, in addition to a number of cases said to have been tried by magistrates.

There can be no doubt—and this is not disputed by the appellants—that there was rioting and arson on a very grave scale that day in Karur. Some photographs filed bear eloquent testimony to the damage done.

Karur is an important weaving centre with about 5000 handloom weavers and 76 handloom factories. About 90 per cent of the weaving population merely work for wages on the looms of capitalist weavers whose factories were supplied with yarn issued to them on ration cards by the Textile Yarn Control Officer on the basis of the number of active looms in their respective factories, in September 1944. Until September 1946 it appears to have been open to a cooly weaver in the employ of a factory to buy his own loom and become eligible for a ration card, entitling him to the supply of yarn direct, a corresponding reduction being then made in the factory owner's ration card. But this and other privileges appear to have been severely curtailed mainly because of the insufficiency of yarn available for distribution. It would appear also that no person who was not a weaver in 1944 could, except with the special permission of the Textile Commissioner, buy a loom and obtain independent supplies of yarn on an individual ration card.

There were two weavers' associations in Karur, the Karur Taluk Handloom Weavers' Association of which one Narkirar alias

Arumugam was the secretary and the United Weavers' Association of which one Subbaratnam a municipal councillor, was the general secretary. They are both incidentally appellants, found guilty of rioting and arson, and each sentenced to five year's rigorous imprisonment in each of these three cases. This association supported an agitation for the issue of individual ration cards to weavers instead of to the factories. Representations were made to the Government departments concerned with no result and, on 21-6-1946, the Secretary in a letter threatened the Textile Officer with direct action if the weavers' demands were not conceded before 7-7-1946. On 23-6-1946 a general meeting of the weavers was held to concert measures, and a committee of action of seven persons was formed, all of whom figured amongst the appellants.

The 11th July 1946 was fixed by the authorities for the distribution of yarn from the retail dealers to handloom factory owners. On the 10th July 2000 weavers marched in procession to the house of the Sub Divisional Magistrate demanding a postponement till they made representations in Madras. The distribution was accordingly postponed till the 14th and again to the 15th. On the 10th July the Sub-Divisional Magistrate took the precautionary measure of prohibiting meetings or processions except under a police licence, by an order under s. 144 of the Code of Criminal Procedure The District Superintendent of Police came to Karur on 13-7-1946 and an attempt to distribute yarn on the 15th July from the retail shop of one Rajagopala Aiyar in Kassim Sahib's Lane very near the Police Station was rendered abortive by a general hartal and a sympathetic strike by coolies and handcart pullers. On the 16th the weavers all went on strike with well-organised picketing. The District Magistrate came to Karur on the 17th of July but all attempts at settlement were unsuccessful, and the decision was taken on 19-7-1946 that yarn would be distributed the next day with the aid of police bundobust to the factory owners. The Association of factory owners on this assurance decided to meet the following morning at the police station and procure their supplies of yarn under cover of police assistanee.

Accordingly between 10 and 11 A.M. on the 20th July, the day of these riots, about 30 factory owners gathered at the police station with motor lorries and hand carts. The District Magistrate and the District Superintendent of Police were also camping there; but they found a crowd of weavers led by agitators already gathered in Kassim Sahib's Lane and around Rajopala Aiyar's shop. Satyagraha technique was first tried by men and women picketers who were found lying across the steps leading into Rajagopala Ayyar's shops to prevent any yarn being taken outside. The District Superintendent of Police himself and the Deputy Superintendent of Police, using the graphic language of the learned Assistant Sessions Judge "lifted the women by their arms and removed them" The police succeeded in pushing the crowd back and in loading a lorry with bales of yarn. Finally in order to clear the crowd to make way for the lorry a lathi charge was made It was after these happenings in the neighbourhood of the police station that matters took a very ugly turn and Satyagraha or passive resistance suddenly turned into violent destruction. This shortly is the background out of which the evidence against these appellants has to be appreciated. We are not concerned with the merits of the grievances of the weavers which appear to have generated some public sympathy. There are, however, ample indications from leaflets and pamphlets and the utterances of the leaders that strong political propoaganda has sedulously capitalised a grievance the weavers undoubtedly had and sought to turn it to advantage in a war on capitalists in general. The weavers were held out to be oppressed by the officials of the textile and other departments of Government who were working for the benefit of the factory owners and so on.

Before dealing with the evidence relating to the individual cases of rioting tried, it may be well to set out the general sequence of the riots that day. It would appear that suddenly and without any warning when there were no police at all in the locality, a mob at about mid-day bent on incendiarism burnt the car of Marippa Mudaliar in its garage in the bypass road and simultaneously attacked Manikka Mudaliar's house next to it. They then burnt the car of Arumugha Mudaliar and set fire to the thatched verandah of Mariappa Mudaliar's house and factory in the Coimbatore Road All this took place between 12 and 1 P M. The District Superintendent of Police arrived with a reserve party at this stage and with some difficulty the crowd was dispersed, after the District Superintendent of Police and a constable each fired one round, one Malayappan, an acquitted accused, was shot in the knee and there was also a lathi charge. The police then appear

to have proceeded to another troubled area, when the mob returned with redoubled fury and, after looting and burning Arumugham's house in the bypass road, finally sacked Mariappa Mudaliar's factory and set fire to its entire contents.

This is roughly the prosecution sequence, not seriously disputed by the learned advocates for the appellants of the events that day in what was undoubtedly a scene of great confusion and disorder.

Reference No. 1 of 1948, Criminal Appeals 66, 67 and 14 /48 and Crown Appeal. Crl. Appeal No. 163 of 1948. These appeals arise out of Sessions Cases No 28 and 50 of 1947 in which 36 persons were charged in connection with rioting, arson and so on, in connection with the factory and house of Mariappa Mudaliar, who was P. W. 16, and the burning of his car. Each batch of appeals arises out of two Sessions Cases because some accused in each discharged by the committing magistrate were in revision directed to be retried by the District Magistrate. The learned Assistant Sessions Judge who tried all these cases in succession and simultaneously delivered judgment on the 3rd of January this year found accused 1 to 1, 13 to 15, 18, 19, 24 25 and 30 guilty of rioting, arson and in fact on a variety of counts He sentenced accused 1 to 4, 9 and 10 in all to five years rigorous imprisonment and the other accused to two years rigorous imprisonment in all. Accused 1 and 10 were in addition fined Rs. 500 and accused 5 and 19 each Rs. 250 as he found they were possessed of property They have all appealed The Crown has also filed an appeal, Criminal Appeal No. 163 of 1948 against the acquittal of accused 12, 16, 17, 20, 28 and 31 to 36.

Reference No. 1 of 1948 made by the leaned Assistant Sessions Judge had a very curious origin He framed a variety of charges in all these cases, in all 14 counts. They included two separate counts and 10, of house breaking which he proceeded to try by a jury who found all the accused so charged not guilty. As assessors also the same Jury found all the accused not guilty on any count. In addition to these house-breaking counts there were charges under s. 188 of the Indian Penal Code for disobedience of an order under s 144 of the Code of Criminal Procedure which was wholly unnecessary Another charge framed was one of abetement against accused 1, 10, 16 and 17 under Ss. 436 and 114 of the Indian Penal Code. As all the accused were charged quite rightly under S. 147 I. P C. with forming themselves into an unlawful assembly with the common object of committing arson, a separate charge of abetment was wholly unnecessary and does not in fact arise. The prosecution in these cases was conducted by the learned Assistant Public Prosecutor of Madras who explai s that it was only in the first case that the t ial Judge tried the house-breaking offences by the adoption of a mixed juror and assessor trial, and that this was abandoned in the subsequent cases There was no justification whatsoever for the trial of the minor house breaking charges by a Jury and unnecesearily adding complications to these already complicated cases. As it appears to us only four simple charges were necessary in each of these cases namely rioting under S. 147 I.P.C. mischief by fire under S. 435 I.P.C. and mischief by fire with in ent to destroy a house under S. 436 I P.C and finally an offence imposing on all the accused constructive liability for these offences read with S. 149 I.P.C. These simple charges should have been quite sufficient There is no necessity for a sessions trial to be cumbered by a medley of minor charges, particularly in a rioting case in which the overt acts constitute evidence of participating in the riot S 147 I.P.C is quite sufficient in its punitive scope adequately to punish these minor overt acts committed The learned Public Prosecutor explained that his assistant at the commencement of the trials suggested simpler draft charges to the learned Assistant Sessions Judge, who however, felt himself bound by the charges framed in the committing court. A trial Judge at Sessions is not bound by the charges framed in the committing court and he has ample power to revise and alter them not only at the commencement of the trial under S 226 Cr.P.C. but under s 227 Cr P C at any stage of the trial before the verdict of the Jury is returned or the opinions of the assessors are recorded. When he came to record his findings as regards the offence committed by each accused, the learned Judge recorded his conviction of each appellant under several counts. For instance he convicted accused 1 and 10 under counts 1, 2, 5, 6, 8 and 12 of the charge and sentenced each of them to rigorous imprisonment respectively for 2 years, 5 years, 5 years 5 years, 5 years and 7 years. To find out what offences they were guilty of, it has been necessary to have the counts before us; and in preparing the warrants, his office must have been put to wholly unnecessary scriptory labour and strain with the possibility of mis-

takes creeping in as regards sections of law. We would impress on trial judges the necessity of clearly recording in their findings the offence of which they find a person guilty and also the section of the Indian Penal Code. The learned trial Judge really created for himself a great deal of unnecessary trouble by framing so many unnecessary charges.

The First Information Report in the case (Ex. P-23) purports to have been made by Mariappa Mudaliar (P W. 16) himself at the Karur police station at 5-30 p.m. on the 20th July itself. According to the Inspector of Police, Sri K. Raman (P.W 17) this long complaint was made to him and at his request a Sub Inspector, Venkatachalam (P.W 5) took down what P.W. 16 told him in his presence. Exhibit P-25 contains a brief description of the happenings that morning up to the lathi charge at about 11 a.m In Exhibit P 23, P.W. 16 said that he was on his way to the police station to take delivery of the yarn when the lathi charge was made, and that some time later Kaliappan (P W, 13) the servant in his factory came running with the news about the mob in front of Manikka Mudaliar's house on fire, and he then says he witnessed the crowd led by accused 1 to 11, all mentioned by name who set fire to everything in his house while his women-folk took refuge on the terrace. The estimate of the damage done was Rs. 1,28,500 In an appendix to Exhibit P-23 the names of 26 other accused appear as persons who assisted in the arson. In Exhibit P-23 there appears the names of seven witnesses said to have been present, of whom only the servant Kaliappan (P.W 13) and one Subbarayar (P W. 15) have been examined. One witness mentioned in Exhibit P-23 is Vaiyapuri Mudaliar, whose brother, Nagarajan, has been examined in stead as P.W 14 It is clear from the non examination of these five witnesses cited in Exhibit P-23 that the investigating police did not, as sometimes happens, confine their attention to the First Information Report but examined independent witnesses (P.Ws 11 12 and 14) instead.

Mr. N Somasundaram for most of the appellants has sought to undermine Exhibit P-23 as a belated document and therefore wholly unreliable on the ground that it does not bear the initials of the Sub-Magistrate or the date stamp of his office There is indeed no indication on its face as to when it was received; but we are unable to follow precisely what adverse inference is sought to be drawn from this obvious omission, in view of the clear evidence that these eye-witnesses excluding the five mentioned in Exhibit P 23 were examined in the investigation on the 21st July There were a number of other First Information Reports received in the Sub-Magistrate's Court that day and the following day in connection with numerous cases of arson No such omission admittedly appears in the First Information Reports in the other cases which are before us We are unable to draw any other inference that there was an accidental omission to initial and date seal this First Information Report in the magistrate's office.

It was next urged that Mariappa Mudaliar, P.W. 16, took sanctuary all that day at the police station and never came near his house at all after the mob proceeded to violence and incendiarism there. This line of defence is based on the evidence of three defence witnesses, D. Ws 18, 19 and 20, all substantial residents of Karur to the effect that they were all in the police station from 11 a.m to 6 or 7 p m that day and that P.W. 16 was there all the time. D W. 18 would even go to the length of saying that P.W. 16's servant Kaliappan also stayed in the station till 6 p m. It is sufficient to say that D W. 18 admitted that his father and accused 16 were partners in the Pasupathi Textiles, an institution which strongly supported the cause of the weavers The natural conduct of a man who hears that a mob is about to loot his house is to go and see for himself what was happening and to arrange for the safety of his women-folk. We may even presume that precautions were taken to put them in a place of safety in anticipation of trouble that day There is, however, nothing to indicate that such a violent outburst of mob fury was anticipated in that locality that day, as when it started there did not appear to have been any constables in the neighbourhood on bundobust duty. We are unable to agree that P. W. 16 would have behaved more naturally had he remained in the station all that day without going near his house which was being looted and burnt We have no doubt that P. W. 16 did see something of the attack on his house but we have good reason to doubt whether everything embodied in Exhibit P-23 is the result of his own personal observations This certainly could not have been the case in view of a long list of 26 other accused named in an appendix to Ex P 23. The learned trial Judge was fully alive to the possibilities of Mariappa

Mudaliar not being able to resist the temptation to include as accused some of his enemies in Karur and indeed he has quite rightly given more than one accused the benefit of the doubt on this ground and acquitted them.

The strongest attack on the prosecution evidence was levelled at Nagarajan (P.W. 14), a brother of Vayyapuri Mudaliar, mentioned as a witness in Exhibit P-23. This witness appears at the time he was examined by the police on the 21st to have been disinterested. He said that at about midday he was passing along the Coimbatore road when he saw a crowd going into the bypass road and accused 3, 4, 5, 9 and 19 setting fire to P.W. 16's Ford car. The crowd then went into the Coimbatore road and there accused 1, 9, 10, 16 and 17 urged the crowd to set fire to Mariappa's factory. Accused 2, 3, 5, 7, 11, 14 and 15 broke open the locked door of the factory out of which they brought out bed sheets and towels and made a bonfire. He also saw accused 2, 3, 9, 30 to 34 bring out various articles, an iron safe, typewriter and furniture and make a bonfire of them. He also saw the thatched varandah in front of the factory set fire to by accused 1, 3, 5, 9 and 12 and he also names the accused who set fire to the jutkas as accused ?, 4, 14 and 19. This witness admitted that he was about 6 or 7 years ago employed by Marriappa Mudaliar for about two years. During the war he was employed in some mechanical department of the Army for 2-1/2 years and says he returned to Karur only eight days prior to the riot Much is made of the fact that subsequent to his being examined as a witness he has been given employment by the family of P.W. 16. P.W. 14 admitted that he is now an apprentice in a knitting factory owned by P.W. 16's son, P.W. 2 and his cousin Arumugham We are unable to accept the suggestion that P.W. 14 was a witness who was prevailed upon to give false evidence in this case with promise of employment. The more serious criticism about his testimony is the large ambit of his personal observations which would make any conviction of an appellant on his uncorroborated testimony without substantial corroboration from more than one source in the circumstances of this case unsafe.

The servant Kaliappan, P. W. 13, and another eye witness, P.W. 12, were disbelieved by the learned Judge. We are not quite satisfied that his total rejection of their evidence is justified. P.W. 13 was in the factory at the time the mob attacked it. His evidence is not esay to reject, because he does not implicate too many persons and the extent of his actual observations is, as would be natural in such cases, small. He saw accused 1, 6 and 17 instigating the crowd to arson where-upon accused 2 and 5 set fire to the thatch of the building. He saw accused 14 and 5 bring the jutkas from the bypass road, throw them into the fire and A-2 and others bring out the yarn from the factory He then says he got frightened and ran away. P.W. 12 is a cooly who saw accussed I, 10 and 16 exhorting the crowd to incendiarism and he then saw accused 2, 3 and 9 light a cloth ball and apply it to P.W. 16's thatched verandah In fear he then ran home. These two witnesses were examined by the police the very next day and appear to us natural observers whose evidence there are no grounds for rejecting in toto. Even apart from the evidence of P.Ws. 12 and 13 there is as the learned Public Prosecutor urges quite sufficient evidence accepted by the trial Judge.

* * * * *

There are no grounds for any suspicion that the eye witnesses who appear to us to be natural were not present at the rioting at all. The main difficulty which the learned Judge has fully appreciated and in our opinion on the whole soundly and correctly surmounted was the danger of innocent persons being implicated as accused. He has not convicted any appellant on the uncorroborated testimony of P.W 16 and P.W 2 alone and used what we consider to be a reasonable and appropriate test of requiring ample corroboration from other witnesses of the presence and specific acts attributed to each of the accused before convicting him.

The learned Judge has sentenced accused 1 to 4, 9 and 10 each to rigorous smprisonment for five years There can be no reasonable doubt that they were the ringleaders not only in the whole agitation but also in the direct incitement of the mob to senseless violence and destruction. Accused 1 was the Secretary of the United Weavers' Association and accused 3 the Secretary of the Karur Taluk Handloom Weavers' Association. A-9 was president of the committee of action elected on 23-6-194? with A-4 as Secretary and accused 1, 3 and 10 as members. As regards A—2 there was material to show that he was one of the leaders in the ration card agitation. There is the evidence of the Deputy Superintendent of Police (P.W. 3) that accused 2 and 3, the only two he named specifically, actively obstructed the movement of the yarn from Rajagopala Aiyar's retail shop before the

lathi charge that morning. P.Ws. 2, 11, 15 and 16 all give him a prominent part in the actual incendiarism. There is abundant cumulative testimony clearly proving the guilt of these six persons as ring leaders in rioting and arson.

It is urged by Mr. Somasundaram that violence and destruction was more probably the work of hooligans, who capitalised an opportunity for loot, but it is significant that no valuable property was taken away and that even currency notes were found half charred This was all clearly not the work of hooligans out to loot but a carefully organized plan on direct violence held in reserve in the event of the first line of passive resistance or Satyagraha failing. The failure of the Satyagraha plan led the ringleaders to bring into operation a plan of organized arson and incendiarism for which they appear to have been fully prepared in the last resort. Indignities to passive resistance endured, with men and women being removed bodily from lying postures, doubtless exasperated them into more violent excesses than they had contemplated.

A separate appeal, Criminal Appeal No. 131 of 1948 has been filed on behalf of Sambasiva Aiyar (A-10) who is not a weaver but is described as a Mirasdar, the son of a lawyer and the brother of a lawyer now in practice. He endeavoured to establish an alibi which the learned Judge rightly rejected to the effect that he took two persons injured in the lathi charge to Dr Menon, D.W. 8, and was with him all that morning. The doctor's evidence is merely to the effect that A-10 brought these persons to him some time between 10 and 12 and that he stayed chatting with him for half an hour. D.W. 8 is A-10's family doctor and he has gone as far as he could to assist him. The times he has given cannot be regarded as in the remotest degree conclusive. P.Ws. 2, 14, 15 and 16 have all given A-10 a most active part all through amongst those who led the crowd. The convictions of accused 1 to 4, 9 and 10 under Ss. 147, 435 and 430 I.P.C. are confirmed. We find rather curiously no direct count of arson against the first accused and only constructive counts though in paragraph 132 of his judgment the learned trial Judge finds rightly that he was one of persons who set fire to the thatched varandah. In view of the number of protracted trials in the lower court which these appellants have undergone and the fact that they have been in remand also throughout we reduce the sentences on these ringleaders to one year's rigorous imprisonment under S. 147 I.P.C. and to three years rigorous imprisonment under each of the arson counts. the sentences to run concurrently.

As regards the other appellants, the learned trial Judge has carefully considered each case separately. We are in agreement with his finding that they are all guilty of rioting and arson with the exception of accused 13, 18, 24, 25 and 30 In their cases we think that the learned trial Judge deviated from the strict test of evidence he adopted in requiring corroborative testimony. As against the 13th accused whose age is given as 20 there is only the evidence of P.W. 2 that he helped to break open the lock of the factory. He was it is true. a weaver and Secretary of the Dravida Kazhagam but there is nothing to show any direct connection between the association and the weavers' agitation. As regards A-18 he claimed to have his own loom and a separate ration card. He has been implicated only by P.Ws. 2 and 15. As regards the 24th accused there is only the evidence of P.W. 15 that he helped to roll an iron safe and put it on the bonfire The age of the 25th accused is given as only 17. He and the 24th accused were once employed in P.W. 10's handloom factory and they fall really into the same category. As against this youth there is only the evidence of P.W. 2 that he brought out some tables to the bonfire and that of P.W. 15 that he set fire to some cycles As regards the 30th accused there is the evidence of P.W. 2 that he brought an iron safe and threw it in the fire. But the sub-inspector, P.W. 17, admitted in his favour that P.W. 2 did not tell him this fact in the investigation. P.W. 14 it is true, corroborated P.W. 2 but we do not consider that this evidence is conclusive.

We think on the evidence that accused 13, 18, 24, 25 and 30 are border line cases entitled to the benefit of a reasonable doubt. We therefore acquit them on all counts and set them at liberty. The convictions of the other appellants are confirmed under Ss. 147, 435 and under 436 read with S. 149 I.P.C. The findings on other counts are unnecessary and set aside.

As regards the sentences we observe that accused 3, 6 and 11 whose convictions we are confirming are young men aged 21, 19 and 22 respectively. We have considered the possibility of applying to them the provisions of the Probation of Offenders Act and placing these misguided youths under S. 6 under the care of the District Probation Officer. We are however, unable to do so as the Act cannot be applied to grave offences such as arson

under S. 436 I.P.C. which is punishable with transportation for life. It is regrettable that A 3 though only 21 should have been so conclusively proved to have been a prominent ringleader in violent crime of this description. The sentences on the other appellants (except A 6) namely A-5, 7, 8, 11, 14, 15, 19 are reduced to six months' rigorous imprisonment under S. 147 and to one year's rigorous imprisonment under Ss. 435 and 430 read with S. 149 I.P.C. the sentences to run concurently In view of the age of Gopal (A 6) and his being a misguided youth we reduce his sentence to 6 months R. I. under S. 147 I.P.C. and to the period already undergone (more than 8 months) on the other counts, the sentences to run concurrently.

The fines imposed on accused 1, 5, 10 and 19 are confirmed as it is just and appropriute that malefactors who are possessed of property and means should make a contribution to the costs of their prosecution which in these cases has been a heavy charge on the tax payer.

I come now to the Crown Appeal, Criminal Appeal No. 163 of 1948 filed against the acquittal of accused 12, 16, 17, 20, 28 and 31 to 30. We have been taken through the evidence against them by the learned Public Prosecutor. A- 2 was the person shot in the knee from Police fire and according to the trial Judge maimed for life. He was clearly amongst the crowd but was fortunate in that P.Ws. 2, 14, and 15 who depose that he set fire to the thatched verandah did not say that to the investigating Inspector. As regards the 16th accused, for instance, he was a partner in the Pasupathi Textiles situated opposite to the factory of P.W. 16. There was clearly material to show differences between accused 16 and P.W. 16 arising out of municipal politics. The learned Judge rejected some alibi evidence adduced for the 16th accused as false, but at the same time he quite rightly gave the 16th accused the benefit of the doubt observing that Exhibit P-23 gave the accused a minor part although the witnesses made him out to be a ringleader. It is unnecessary to consider separately the cases of the other accused. In no case is there overwhelming and conclusive testimony which would justify the setting aside of the acquittal. As regards the 17th accused against whom alone the learned Public Prosecutor would press the appeal, he is a young Chettiyar student aged 21 mentioned by P.Ws 2, 14, 15 and 16 as a person who took an active part in the riot. He was acquitted on the ground that Exhibit P-23 placed him in the appendix of assistants and gave him no leading part. He is the only person who was released on bail early in this case. It is brought to our notice that he has been convicted in the next batch of arson appeals we are considering We do not find sufficient and cogent material to justify a reversal of his acquittal by the learned Judge in the present case.

The Crown appeal accordingly in the result is dismissed in toto.

Before leaving this case we feel called upon to deal which two points of police procedure in investigations which Mr.Somasundaram for the appellants has canvassed at length presumably in a belated attempt in this Court for the first time to question the *bona fides* of the entire police investigation. Both points he raised are based on replies given by the Inspector Sri Ram (P.W. 17) to questions put in cross-examination in the trial court by the learned advocate who it is said was once a Deputy Superintendent of Police. He seems to have used his knowledge of police procedure to heckle, not very seriously the police investigating officer. The Inspector said in cross-examination. "I cannot say whether it is my duty to record the names of the accused in the General Diary". From this Mr. Somasundaram has argued that no names of the accused at all were noted in the General Diary entry about this case. The General Diary entry itself has not been exhibited for the defence. It is sufficient to say that under s. 154 of the Code of Criminal Procedure, the substance of a first information has to be entered in a book in such form as the Provincial Government may prescribe and that under Madras Police Standing Order No. 538 the book prescribed by s 154 Cr.P.C. is the first information book in form No. 78 in which the present F.I.R. (Exhibit P-23) was admittedly recorded. The G D entry need not give, as the learned Public Prosecutor points out, all the names of the accused in cognizable offences and Police Standing Order No. 696 specifically says that details of complaints already given in the F. I book and the case diary need not be recorded in the General Diary.

The second point is based on the Inspector's frank and straight forward admission that he made notes as he examined each witness with the aid of which he later typed his diary: and that his notes which were "scribblings" were not preserved There is no suggestion that the substance of the examination of each witness was not separately recorded in the case Diary. Mr. Somasundaram contended, as we

understood his argument, that there was an obligation on P.W. 17 to preserve, keep and produce when required all the rough notes he made of the examination of witnesses. He relied on a Nagpur case *Baliram* v. *King Emperor* (1) in which the scope of s. 162 of the Code of Criminal Procedure was considered and some strictures passed on the police procedure in suppressing records of statements from the witnesses during investigation. In that case some witnesses said their statements were reduced to writing. The investigating officer said he had made notes of their statements but had destroyed them. The case diary did not contain the substance of the statement made by each witness examined and there was a clear breach of s 162 Cr.P.C. It is not imperative for an investigating officer to make any written record at all of the statement every witness he examines under s. 161 Cr.P.C. makes to him. This is made quite clear by s. 161 (3) added by Act II of 1945 which reads as follows :—

> " A police officer may reduce to writing any statement mide to him in the course of an examination under this section. If he does so, he shall make a separate record of the statement of each such person whose statement he records."

If such a separate record appears in the case diary there is a sufficient compliance with the statutory requirements of s. 162 Cr.P.C. which only entitles an accused to a copy of the record of such statement " whether in a police diary or otherwise." We are unable to find any authority for the position that s. 162 imposes a statutory obligation on an investigating officer to produce all his rough notes and jottings out of which he writes up his case diary for the day. We have been referred in this connection to a recent Bench decision of this Court in *Subba Reddi* v. *Emperor* (2). In that case an investigating Inspector said in the box that he could not say from his case diary what each witness had stated, that he made rough notes and did not prepare individual statements, and that he had the rough notes with him but he was not asked even to produce them. Our attention has been drawn to the following observation by Bell, J. :

> " It is no doubt desirable as was pointed out by *Baliram* v. *Emperor* (1) that notes, however and whenever taken by the police officer, should be preserved."

We do not after a careful perusal of that dicision consider that the scope of that observation extended to casting on a police officer any duty of preserving and producing all his rough notes made in an investigation. Horwill, J. in the same decision made the following observation.

> "Although no irregularity was committed by the taking of notes for the preparation of the case diary instead of recording statements, it seems desirable that statements should be recorded where reasons of urgency do not preclude this course."

With respect we are in complete agreement with this observation, the law as it stands, not making it imperative on a police officer to make any record at all of a statement made to him in the course of an investigation. All that an accused is entitled to demand is that when a written record is kept of the statement of the witness to an investigating officer he shall be entitled to a copy of that record; and if the case diary contains as it should the substances recorded separately of the statement by each witness to the police officer, the latter is under no obligation to preserve or produce any other record, rough or otherwise of such a statement. It has been urged before us that the production of the rough notes or rough statements recorded may disclose some accidental slip or clerical error which when compared with the case diary entry may be material to the defence. But s. 162 of the Code of Criminal Procedure has made no provision for such a remote contingency. Rough notes unlike the case diary may easily be brought into existence and any such material slip or error can easily be corrected to accord with the case diary before the rough notes are produced for Court's inspection. To permit an accused person to enforce the production of all the rough notes made by a police officer in his investigation and to require a police officer to preserve them would be to bring into court an untidy mass of scribbled matter which will serve little purpose and we shall have police officers laboriously making fair copies of their scribbed investigation notes for judicial assimilation and consideration. It is only when a police investigating officer makes a written record of a statement of a witness, and is shown not to have incorporated it as a separate statement in his case diary that he can be said to be guilty of a breach of a statutory obligation.

* * *

GOVINDARAJACHARI J : I am in substantial agreement with my learned brother but I desire to add a few observations.

One is with regard to the evidence of P.Ws. 12 and 13 in S C. No. 28 of 1947. The learned

1. (1945) I.L.R. Nag. 151
2. (1947) M.W.N. 209 : Cr. 37

Public Prosecutor with his usual fairness intimated that he would hesitate to ask us to rely on that evidence in view of the fact that the Assistant Sessions Judge was not himself prepared to act on it. Though, as my learned brother has observed there may be room for doubting whether the rejection of their evidence by the Court below is altogether justified, it is, in my opinion, safer that the case is judged apart from and excluding the evidence of these witnesses. I would only emphasise that that is how we have judged.

There has been some discussion as to whether in S.C. No. 28 of 1947 the defence had to exhibit the General Diary and whether and to what extent they obtained an admission in regard to its contents from the Inspector of police, P. W. 17. It seems to me that P. W. 17 admitted that the names of all the accused were not recorded in the General Diary. But this, however, does not exclude the possibility of the name of the first accused having been entered with the rest of the accused being indicated by an etc., of the total number of the accused having been given. If the defence desired to exclude these possibilities also, they should either have had the General Diary included in the evidence or cross-examined P.W. 17 further. However, in view of Police Standing Order No. 696 there is no need to enter in the General Diary details of complaints already given in the F.I.R. book.

The following answers were elicited from the investigating officer, P. W. 17, "The case diary is typed. As I examined the witnesses, I took notes. Later I had the matter typed in the Diary. The notes were not preserved They were scribblings". Relying on this evidence Mr. Somasundaram, the learned advocate for the appellants argued that there was a serious irregularity by way of non-compliance with the requirements of the Code of Criminal Procedure.

S. 161 of the Code deals with examination of witnesses by the police. Under s. 161 (3)

> "a Police Officer may reduce to writing any statement made to him in the course of an examination under this section. If he does so, he shall make a separate record of the statement of each such person whose statement he records."

When such statement is recorded whether in the Police Diary or otherwise s. 162 requires the Court, on the request of the accused, to grant a copy of such statement, in order that any part of it, if duly proved may be used to contradict the witnesses making it in the manner provided by s. 145 of the Evidence Act. It is no doubt not imperative on the investigating officer to record the statement of a person examined by him under s. 161. But if he records the statement, it is clear that it must be preserved. This is implicit in the right accorded to the accused of obtaining a copy of it. The statement need not be taken down verbatim. The investigating officer need do no more than record a gist of the statements made to him (see *Guruva Vannan In Re* (3). But on the clear language of s. 161 (3) itself the statement of each person must be separately recorded. The reason is obvious For the purpose of contradicting a witness by a previous statement of his, a condensation of what he and others said will be of little practical value. It is also extremely doubtful whether such an abstract can be described as a previous statement of the witness reduced to writing within the language of s. 145 of the Evidence Act.

That s. 162 confers on the accused protection and previleges of a substantial nature can hardly be doubted. Destruction of the record so as to make it unavailable or a refusal to supply the accused with a copy of it will have effect of depriving him of a very valuable right and will, therefore, be regarded with gravity. In *Baliram* v. *King Emperor* (1) the investigating officer destroyed the notes he made of the statements of the persons whom he examined during the investigation after incorporating them in the Case Diary. From the facts set out at page 164 of the report it would, however, appear that what was entered in the case diary was a fusion of the several statements into a compact narrative which afforded no scope to the accused for confronting the witnesses with their statements originally noted down but destroyed. It was held that in the result the accused was denied the benefit of the statements recorded under s. 162 for cross-examination of the witnesses concerned and that this constituted a serious departure from the mode of trial prescribed by law and occasioned failure of justice rendering the conviction liable to be quashed. In *Kottaya* v. *King Emperor* (4) the irregularity lay in not making available to the accused till a late stage of the trial, the note book of the police Sub Inspector containing statements of the witnesses he had examined at the inquest.

3. (1944) M.W.N. 213 : Cr. 5
4. (1947) M.W.N. 217 : Cr. 45; I.L.R. 1948 Mad. I.P.C.

It was held that such a failure was undoubtedly a breach of the proviso to s. 162 of the Code which had, however, in the peculiar circumstances of the case, not occasioned any prejudice to the accused, that the case consequently fell under s. 537 and the trial was valid notwithstanding the breach of s. 162.

Neither of these cases, however, directly bears upon what happened in the present case. In the course of the discussion whether the rough notes or scribblings made by an investigating officer should be preserved, the learned Public Prosecutor drew our attention to a decision of Horwill and Bell JJ. in *Subba Reddi* v. *Emperor* (2). In that case Bell J. observed as follows:—

> "It is no doubt desirable as was pointed out in *Baliram Tikaram* v. *Emperor* (1) that notes however and whenever taken by the police officer should be preserved."

With great respect, this observation, judging from its wide language derives no support from *Baliram's case* (1) the exact scope of which I have already discussed. It seems to me, however, on a close examination of the rest of the judgmedt of Bell, J. that he did not intend to lay down any general rule such as the observation just quoted may seem to suggest. I note in particular that the learned Judge stated that "nothing is more natural than that he (the investigating officer) should make rough notes of information which later he would set out in proper form in the case Diary for the scrutiny of his superior officers." The rough notes were available in that case and on their being inspected it was found that the Case Diary was an amplification of those notes. Horwill J. pointed out that although no irregularity can be said to have been committed by the taking of notes for the preparation of the Case Diary instead of recording statements, it is desirable that such statements should be recorded where reasons for urgency do not preclude that course. The learned judge drew a distinction between notes which are in the form of summaries of statements made by individual witnesses and notes which give a very brief summary of the narrative found in the Case Diary and do not take the form of summaries of individual statements made by the various witnesses. In the former case according to the learned Judge the notes should be made available to the defence. In the latter the police officer would be justified in objecting to the production of his notes. In the case of *Subba Reddi* v. *Emperor* (2) however, the police officer did not so object.

In view of the judgment in the case of *Subba Reddi* v. *Emperor* (2) the observations in which I have set out at some length, it seems to me that it cannot be maintained that there was anything irregular in what P. W. 17 did in the present case. I may add that Mr. Somasundaram did not suggest anything against the *bona fides* of the officer who seems to have impressed the Assistant Sessions Judge by the straightforward manner in which he deposed. Having had the benefit of a full discussion by the Bar I have thought it desirable to indicate my opinion as to whether the existing practice which evidently P.W. 17 followed is irregular. In my opinion, for the reasons stated, it is not.

N.T.R.

Cr. R. C. Nos. 394, 395, 396 & 397 of 1948
Cr. R. P. Nos. 363, 364, 365 & 366 of 1948

November 3, 1948

GOVINDA MENON, J.

VELAYUDA MUDALI & others
v.
THE KING

Cr. P. C. (V of 1898), Ss. 494 & 347—Warrant case—Conversion into preliminary register case—Withdrawal—Effect.

In a warrant case charges were framed against the accused. Subsequently the case was converted into a preliminary register case and proceeded with on that basis. During the progress of the enquiry, the Public Prosecutor applied under s. 494, Cr.P.C. for permission to withdraw the case, stating also that the intention was to file separate prosecutions against the accused differently for various offences. Fresh cases were filed in each of which some of the accused in the previous case were arraigned against for offences under the Penal Code.

Held, (*i*) *that the alteration of the calendar case into a preliminary register case did not legally affect the nature of the proceedings;*
(*ii*) *that the withdrawal of the case after the framing of charges amounted to an acquittal of the accnsed and that the prosecution was not entitled to file fresh charge-sheets against the accused for such of the offences for which charges had already been framed.*

The Criminal Proceduae Code does not contemplate a withdrawal with permission to file a fresh complaint and hence even such a withdrawal after charge had been framed amounts to an acquittal.

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the

Judgment of the Court of the Additional First Class Magistrate, Ranipet dated 13-2-1948 in C. C. No. 141 of 1946 etc.

P. C. Parthasarathy, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT

The circumstance arising in these four revisions have to be set out briefly in order to understand the point of law raised by Mr. P. C. Parthasarathy Ayyangar, the learned counsel for the petitioners.

C. C. No. 138 of 1948 on the file of ihe sub-Divisional Magistrate, Vellore, was the result of a charge against forty accused for various offences under the Indian Penal Code. When that was taken up for hearing, six of the accused were absconding and so the case was split up against the absconders and numbered as C. C. No. 207 of 1946. Subsequently C. C. No. 207 of 1946 was transferred to the Additional First Class Magistrate of Cheyyar at Ranipet and numbered as C. C. No. 74 of 1946. In the meanwhile, the Sub-Divisional Magistrate, Vellore, proceeded with the enquiry against the 34 accused before him in C. C. No. 138 of 1946 and framed charges against them for offences under Ss. 147, 448, 427, 435, 325 and 332 I.P.C. Afterwards this case was also transferred to the Additional First Class Magistrate of Cheyyar at Ranipet and numbered as C.C. No. 73 of 1946. Subsequently, on an application made by the accused in C.C. Nos. 73 and 74 of 1946, they were clubbed together as one case and intended to be tried as such. The accused again filed an application praying that as a combination of the fifth and sixth charges, viz. those under Ss. 325 and 332 I. P. C. would constitute the more serious offence under s. 333 I.P.C., exclusively triable by a Court of Session, the calendar case should be converted into a preliminary register case and proceeded with on that basis. On this petition arguments were heard and an order passed by which C.C. Nos. 73 and 74 of 1946 were converted into P. R. C. No. 1 of 1946. During the progress of the enquiry in P.R.C. No. 1 of 1946, the Public Prosecutor applied under s. 494 Cr. P. C. for permission to withdraw the case stating also that the intention was to file separate prosecutions against the accused differently for various offences. The Court granted the permission for the withdrawal and discharged the accused under s. 494 (a) Cr.P.C.

The four cases out of which the above criminal revision cases arise were subsequently filed in each of which some of the accused in P.R.C. No. 1 of 1946 have been arraigned against for offences under various provisions of the Indian Penal Code. Thereupon counsel for the accused took the objection that the result of the withdrawal of P.R.C. No. 1 of 1946 amounted to an acquittal of the accused for such of the offences as were triable by the Additional First Class Magistrate, such as offences under Ss. 147, 448, I.P.C. etc. The lower Court has overruled those objections and the petitioners have sought to revise those orders.

The question for consideration is what in substance is the effect of the withdrawal of P. R. C. No. 1 of 1946. The rulling in *Sriramulu* v. *Veerasalingam* (1) is authority for the position that when once a charge is framed, it cannot be wiped off by either discharging the accused or withdrawing the case. It is clear that proceedings before a magistrate in a warrant case are only enquiries until the charge is framed and as soon as the charge is framed, the enquiry is transformed into a trial. Where the case has developed into a trial stage, its dismissal or withdrawal will result only in an acquittal of the accused. The original charge framed cannot be ignored or cancelled without either a conviction or an acquittal. Even if after the framing of a charge, a succeeding magistrate examines the witnesses afresh and passes an order of discharge, still such an order would amount to an acquittal. The decision in *Sriramulu* v. *Veerasalingam* (1) has been consistently followed in this Court: See *Abdul Hameed* v. *Mnhamad Sali* (2). As early as 1888, a Bench of this Court in *Queen Express* v. *Sivarama* (3) has held that an accused committed to Sessions on a charge cannot be discharged by the Sessions Court under s. 494 Cr.P.C. but must either be convicted or acquitted. The withdrawal of a charge by the Public Prosecutor with the permission of the Sessions Judge amounts to an acquittal of the accused. Bearing the principles underlying the above decisions, let us see what is, in effect, the result of the withdrawal. The learned Public Prosecutor urges that the request for withdrawal was combined with the statement that intention of the prosecution was to file separate cases against individuals or groups of accused separately and according to him, in pith and substance, the order giving permission

1. (1914) M.W.N. 646 : 38 Mad. 585
2. (1940) M.W.N. 962 : Cr. 126
3. (1889) I.L.R. Mad. 35

to withdraw the case amounts also to an order empowering the institution of the present cases. If the Code of Criminal Procedure contained a provision similar to O. XXIII, r. 1 C.P.C., allowing the withdrawal of a case with permission to file on the same facts, a fresh complaint, this argument is entitled to weight. But in the absence of any such rule of law, one has to envisage the result of a withdrawal in accordance with the ideas underlying the sections of the Cr.P.C. if it is impossible to wipe off or obliterate a charge already framed without an acquittal or with the culmination of the charge in a conviction any withdrawal with permission to file a fresh complaint cannot be understood as the keeping alive of a charge. Moreover, the Criminal Procedure Code does not, in specific terms, provide for the conversion of the category of calendar cases into the category of preliminary register cases By S. 347, the Code enacts that if, after the commencement of an enquiry or trial, it appears to the magistrate at any stage of the proceedings before signing the judgment that the case ought to be tried by a Court of Session or the High Court and if he is empowered to commit for trial, he shall commit the accused under the provisions of the Code. In this case the First Class Magistrate converted the calendar case into a preliminary register case under the powers conferred by this section. Without altering the nomenclature of the cases, if he had committed the case, the section would have been satisfied. The alteration of the nomenclature into a preliminary register case does not legally affect the nature of the proceedings and if the nature of the proceedings is not affected, the withdrawal of a case after the framing of a charge, can amount to an acquittal of the accused and nothing else.

I would therefore hold that the prosecution is not entitled to file fresh charge sheets against the accused for such of the offences for which charges had already been framed. But it is open to the prosecution to show, on the facts proved and on the facts elicited, an offence exclusively triable by a Court of Session for which no charge had been framed before the withdrawal has been committed. These revision petitions are therefore allowed only to the extent that the enquiry in the various calendar cases before the Lower Court cannot proceed for any offences for which charges had already been framed. The courts are at liberty to proceed with the enquiry in relation to an offence triable exclusively by a Court of Session which might emerge from the evidence adduced.

N.T.R. —

FULL BENCH

Cr. App. Nos. 169, 182 & 183 of 1948.

November 12, 1948.

RAJAMANNAR, C.J., HORWILL & RAJAGOPALAN, JJ.

S. M. NATHANIEL

v.

EMPEROR.

Cr. P C. (V of 1898), s. 411 A—If **intra vires** *—Criminal Procedure Amendment Act (XXVI of 1943)—Government of India Act, 1935, ss. 100, 103 & sch. VII, List II, Entries 1 & 2; List III, Entries 2 & 15.*

Central Act XXVI of 1943 inserting s. 411-A in the Code of Criminal Procedure is a valid enactment of the Central Legislature.

Appeal in criminal matter is a matter falling within 'criminal procedure' in entry 2 in List II of sch. VII, Government of India Act, 1935; or at least within 'all matters included in the Code of Criminal Procedure at the date of the passing of this Act' in the same entry.

'Matters' is much more comprehensive and of wider import than 'provisions'. The matter of providing appeals in criminal cases generally is a matter included in the Code of Criminal Procedure.

Observations of Rau J. in A I.R. 1939 Cal. 628 & of Govinda Menon J. in 1948 M.W.N. 853; Cr. 193 F. B. held obiter.

'Administration of justice' in entry 1 in List II should not be understood in a wide sense. Nor would every conferment of a right of appeal amount to the 'constitution or organisation of courts'. 'Organisation' cannot be construed as comprising providing of a right of appeal.

Prior legislative practice can be looked into in construing the legislative lists in sch. VII.

A resolution of the Governor who has assumed to himself all legislative powers under s. 93, Government of India Act, would amount to a resolution for the purpose of s. 103; and Central Act XXVI is valid because of s. 103.

Sub-sec. (4) of s. 100 Government of India Act empowers the Central Legislature to make laws for areas other than Governors' Provinces and does not give the Central Legislature power to enact laws with reference to matters in the Provincial List.

because the legislation is for all the provinces or for more than one province.

Appeals under s. 411-A, Cr. P.C. against the convictions and sentences passed upon each of the said accused in Case No. 10 of the First Criminal Sessions of 1948 of the High Court of Judicature, Madras, passed in the exercise of its Original Criminal Jurisdiction on 11th March 1148.

K. S. Jayarama Ayyar, C. R. Pattabiraman, V. T. Rangaswami Ayyangar, R. Santanam R. J. Manickam, D. Narasaraju & A.F. Coelho, for Applts.

K. Rajah Ayyar (Advocate General) & Public Prosecutor (V.L. Ethiraj) as Crown Prosecutor on behalf of the Crown.

JUDGMENT

RAJAMANNAR, C. J. :—The appellants in the above appeals were accused 1 to 4 in Case No. 10 of 1948 at the first Criminal Sessions of this court in the year 1948. All the four appellants were found guilty by a majority of the jury of the offence of conspiracy to murder the late Dr. Habibulla. The appellants in Criminal Appeal No. 183 of 1948 were found also guilty of murdering him, while the appellants in Criminal Appeals No. 169 and 182 of 1948 were found guilty of abetting the murder. The majority verdicts of the jury were accepted by Bell, J., who tried the case, and they were sentenced to death. The appeals were preferred under s. 411-A of the Code of Criminal Procedure, which had been added to the Code by Act XXVI of 1943, with the leave of the appellate court on matters of law and fact. The appeals came up for hearing before Horwill and Govinda Menon, JJ. The learned Public Prosecutor raised a preliminary objection that the appeals were not maintainable, because Act XXVI of 1943 was invalid as being *ultra vires* of the Central Legislature, which had enacted it. As the learned Judges felt that it was desirable that the preliminary objection should be considered by a Full Bench, the papers were placed before me, and this Full Bench was constituted to hear the preliminary objection. At the hearing before us, the learned Advocate General appeared on behalf of the Provincial Government and argued in support of the preliminary objection.

Before the passing of Act XXVI of 1943, the provisions of law relating to the conviction and sentence or acquittal by the High Court at its Criminal Sessions were as follows: Under Clause 25 of the Letters Patent, there was no appeal to the High Court from any sentence or order passed or made in any criminal trial before the Courts of Original Criminal jurisdiction which may be constituted by one or more judges of the said court. But it was in the discretion of any such court to reserve any point or points of law for the opinion of the High Court. When such point or points of law were so reserved, or, if it was certified by the Advocate General that, in his judgment, there was an error in the decision of a point or points of law decided by the court of original criminal jurisdiction or that a point or points of law which has or have been decided by the said court should be further considered, the High Court had full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the court of original jurisdiction, and to pass such judgment and sentence as may seem fit. The Code of Criminal Procedure did not contain any provision conferring a right of appeal from a sentence or order passed by the High Court in exercise of its original jurisdiction except in cases specified in S. 449 which ran thus:

"(1) Where—

(a) a case is tried by jury in a High Court or court of Session under the provisions of this Chapter, or

(b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or

(c) a case is tried by jury in the High Court, in a Presidency town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a Presidency town, have been triable under the provisions of this Chapter, then, notwithstanding anything contained in S. 418 or S. 423, sub-sec. (2) or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from an Original order of acquittal passed by the High Court in any such trial as is referred to in sub-sec. (1).

(3) An appeal under sub-sec. (1) or sub-sec. (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court."

By Act XXVI of 1943 passed by the Indian Legislature, S. 411-A was inserted after S. 411 of the Code, providing for appeals against convictions and acquittals on trials held by a High Court in the exercise of its original criminal jurisdiction, notwithstanding anything contained in the Letters Patent of any High Court, and without prejudice to the provisions of S. 449. S. 7 of that Act, *inter alia*, also declared that cls. 25, 26 and 41 of the Letters Patent for the High Courts at Bombay, at Madras and at Fort William in Bengal, shall cease to have effect.

The legislative powers of the Central and Provincial legislatures are contained in the provisions of Part V of the Government of India Act, 1935. S. 99 (1) declares that the Federal Legislature (corresponding to the Central Legislature) may make laws for the whole or any part of British India, and a Provincial Legislature may make laws for the Province or any part thereof. The subject with respect to which these two Legislatures have power to make laws are indicated in S. 100, which runs thus:

> "(1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the Federal Legislative List.)
>
> (2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').
>
> (3) Subject to the preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').
>
> (4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

It is clear from this section that if the subject matter of Act XXVI of 1943 is one of the matters enumerated in List I or in List III in the Seventh Schedule to the Act, then the Central Legislature is perfectly competent to pass the said enactment. If it is not, then, *prima facie* the Central Legislature has no such power, according to the provisions of this section I do not think there is any substance in the contention of Mr. K. S Jayarama Ayyar the learned advocate who appears on behalf of accused 1, that under sub-sec. (4) of S. 100, the Central Legislature has power to make a law with respect to a matter enumerated in the Provincial Legislative List, if that law is made not for a Province or any part thereof but for all the Provinces or for more than one Province. "Province" is defined in S. 46 (3) of the Act as "a Governor's Province" that is to say, "Province" would not include what are described as "Chief Commissioner's Provinces" in Part IV of the Act, which do not have Legislature. For these latter Provinces, the Federal or Central Legislature would have power to make laws, even with respect to matters enumerated in the Provincial Legislative List. Any other construction would lead to the absurd result of altogether destroying the difference between the several lists, Federal, Concurrent, and Provincial. In my opinion S. 100 (4) empowers the Federal or Central legislature to make laws with respect to matters enumerated in the Provincial Legislative List only for areas other than the Governor's Provinces.

It was common ground that the subject matter of Act XXVI of 1943 is not covered by any of the entries in List I, the Federal Legislative List. It was contended by the learned Advocate General that it falls within the scope of entries 1 and 2 of List II, the Provincial Legislative List, and that it does not fall within entries 2 and 15 of List III, the Concurrent Legislative List, as contended by the counsel on behalf of the accused. Naturally, the contest ranged mostly around the interpretation to be placed on the language of entry 2 of the Concurrent Legislative List, which runs thus:

> "Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act."

On the one hand, the learned Advocate General argued that the subject matter of Act XXVI of 1943 was neither criminal procedure, nor a matter included in the Code of Criminal Procedure. On the other hand, counsel for the accused argued that it was criminal procedure, and even if it were not, it was certainly a matter included in the Code of Criminal Procedure at the date of the passing of the Government of India Act.

Procedure, though a familar word, is a word of uncertain and indefinite import. Jurists have found difficulty in defining

exactly what procedure comprises, and where the line of distinction should be drawn between procedural or adjectival law and subtantive law. Salmond describes the true nature of the distinction thus:

> "The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quod ad actions pertinel*—using the term action in a wide sense to include all legal proceedings, Civil or Criminal. All the residue is substantive law, and relates not to the process of litigation but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments; by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated."

The learned author points out the error in describing substantive law as that which defines the rights, and procedural law as that which determines the remedies. In this context, he says—

> "This application, however, of the distinction between *jus* and *remedium* is inadmissible. For, in the first place, there are many rights which belong to the sphere of procedure; for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on In the second place, rules defining the remedy may be as much a part of the substantive law as are those which define the right itself"

The learned Advocate General invited our attention to the well-known class of cases in which it has been held that a right of appeal is a substantial and vested right, which would not be presumed to have been taken away, by retrospective operation of a statute, passed after the accrual of such a right. [*Colonial Sugar Refining Co* v. *Irving* (*1*).] It has been pointed out again and again in these cases that a right of appeal is not such a right of mere procedure which could be adversely affected retrospectively. In my opinion, no assistance can be derived from this class of cases, because an appeal may be a valuable and substantial right, and in practice almost equivalent to a rule of substantive law. Nevertheless, in form, it may belong to the category of procedure. In *Venugopala Reddiar* v *Krishnaswami Reddiar* (2) Varadachariar, J says:

> "In one sense, a right of appeal may be spoken of as a matter of procedure and it is usually provided for in Codes relating to Procedure."

The following passage from Salmond on Jurisprudence, 8th edition, at page 497, is apposite in this connection :

> "Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such cases the difference betweed these two branches of the law is one of form rather than of substance."

Now, we are here called upon to construe the word "procedure" to find out what it was intended to comprise as subject-matter with respect to which a legislature can make laws. We are not called upon to construe it to find out if a particular matter is a matter of procedure so as to exclude the presumption against retrospective operation of a rule affecting it. It may be that several matters would be comprised within the definition of procedure, which would nevertheless be matters relating to substantial rights of parties, with respect to which retrospective operation may not apply.

Mr. Jayarama Ayyar argued that the subject-matter of "appeals" has always been included in the Procedure Codes, Civil and Criminal in the continuous course of legislation in India, and that such legislative practice can be utilised as a useful guide in the interpretation of the descriptive terminology adopted in the Constitution Act, and particularly in the Lists in Schedule VII. In *In re C. P. Motor Spirit Taxation Act* (3) Gwyer, C J. accepted this as legitimate. He said :

> "Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustoment to provide for the collection of excise duties; for Parliament must surely be presumed to have had Indian legislative practice in mind and unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

1. (1905) A.C. 369

2. (1943) M.W.N. 345 : 6 F.L.J. 47 (51) F.C.
3. (1939) M.W.N. 25 : 2 F.L.J. 6 F.C.

In the same case, Sulaiman, J. referred to the following observations in *E. R. Croft* v. *Sylvester Dumphy* (4):—

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in *legislative practice*, and particularly in the legislative practice of the State which has conferred the power."

In *Sir Byramji Jeejeebhoy* v. *The Province of Bombay* (5) the learned Judge of the Bombay High Court applied the same rule. Kania, J. as he then was, after citing from *Craft* v. *Dumphy* (4) said:

"These observations show that in construing the words used in the Constitution Act the powers of the Imperial Parliament which passed the Act and its practice have to be borne in mind in ascertaining the meaning of the words used in the Constitution Act."

There can be no doubt that the provisions regarding appeals have always found a place in Codes of Procedure. Part VII of the Code of Criminal Procedure, as it stood on the date of the passing of Constitution Act, dealt with "appeal, reference and revision". I think it is reasonable to presume that the framers of the Constitution Act intended to convey by the words "criminal procedure" all that was commonly being treated as part of criminal procedure in the legislative enactments of the Indian Legislatures, before the date of the Constitution Act.

The learned Advocate-General relied strongly on the decision of the House of Lords in *The Attorney-General* v. *Herman James Sillem* (6) and certain observations therein. In that case, the validity of rules made by the Barons of the Court of Exchequer under S. 26 of the Queen's Remembrancer's Act conferring a right of appeal in motions on the revenue side of the Exchequer, came up for decision. Under S. 26 of the Act, the Barons had the power to make rules and orders as to the "process, practice, and mode of pleading on the Revenue side of the court". It was held by the court, by a majority, that the rules were void, because the words, 'process, practice, and mode of pleading" were not used in the abstract, but with reference to existing courts, and that 'practice' meant the rules which guide the mode of proceeding within the walls of the court itself. The creation of a right of appeal was an act which required legislative authority, and neither the inferior nor the superior tribunal, nor both combined, could create such a right, it being essentially one of the limitation and extension of jurisdiction. The judgment of the Lord Chancellor (Lord Westbury), rested on the fundamental justice conception that the creation of a new right of appeal required legislative authority because the court from which the appeal is given and the court to which it is given must both be bound, and that can be only by the act of some higher power. It was not competent to either tribunal or both collectively to create such rights. A power to regulate the practice of a court "does not involve or imply any power to alter the extent or nature of its jurisdiction". After holding that the words "process, practice, and mode of pleading" occurring in the two places of the section should be given the same meaning, the learned Lord Chancellor proceeded to say:

"Taking, then, the word 'practice' as equivalent to the *cursus curiae* or regulation of proceedings within the court itself, the question is whether the 34th, 35th and 36th sections of the Act of 1854 can, with any propriety of language, be denominated provisions of rules respecting process, practice, and mode of pleading.........An appeal is the right of entering a superior court, and invoking its aid and interposition to redress the error of the court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal".

Clearly neither the decision, nor the observations therein, have any bearing whatever on the question which falls for decision in this case. Entry 15 of of List III gives ample power to the Central Legislature to pass legislation with respect to the jurisdiction and powers of courts, if the provision relating to appeals falls within the words in entry 2, "criminal procedure".

Even assuming that the subject matter of Act XXVI of 1943 does not fall within the words "criminal procedure" in entry 2 of the Concurrent List, I am clearly of opinion that it will fall within the words, "all matters included in the Code of Criminal Procedure at the date of the passing of this Act", in the same entry. The learned Advocate General contended it would not fall into that category, because the word "matters" should be construed as meaning provisions" and also because a right of appeal from a sentence or order of a judge of

4. (1933) A.C. 156 (165)
5. (1940) 3 F.L J. 25 (H.C.)
6. 10 H.L. cases 704: 11 E.R. 1200

the High Court sitting in criminal sessions to the High Court in the exercise of its appellate jurisdiction is not a matter which specifically finds a place in the Code of Criminal Procedure. I do not think there is any warrant for such a construction. The word "matters" is much more comprehensive and is of wider import than the word "provisions". The learned Advocate-General was forced to admit that a logical application of the construction for which he contended would lead to the anamalous result that the provisions of s. 411A inserted by Act XXVI of 1943 would be valid if they were inserted by way of amendment to s. 449 of the Cr.P.C., but as a separate section it would be invalid. Obviously, the Code of Criminal Procedure deals with matters which cannot be described as matters of procedure. Such are, for example, matters contained in Chapter X, Public Nuisances, Chapter XII. Disputes as to Immoveble Property, Chapter XIII, Preventive Action of the Police, Chapter XXXVI, of the Maintenance of Wives and Children, and Chapter XXXVII, Directions of the nature of Habeas Corpus. These matters would certainly be covered by entry 2, and would be matters in respect of which the Central Legislature would have power to make laws. Support can be found for this construction of the latter part of the entry in the recent judgment of the Full Bench of this court in *Cr. M.P.* 1072, *etc. of* 1948,* which dealt with s, 491 of the Code. It was there pointed out that the word "including" is used in that entry as a word of enlargement and not of restriction (vide *Dilworth* v *Commissioner of stamps* (7). Part VII of the Code comprises Chapters XXXI and XXXII which deal with appeals, references and revisions. S. 449 is a special provision relating to an appeal from a Judge of the High Court sitting in sessions to a Division Bench of the High Court in certain cases It is, therefore, reasonable to presume that the matter of providing appeals in criminal cases generally is a matter included in the Code of Criminal Procedure.

Considerable reliance was placed by the learned Advocate General on certain observations of Narasinga Rau, J. in *Stewart* v. *Brojendra Kishore* (8). In that case, the impugned provision was S. 10-C inserted by the Assam Court of Wards (Amendment) Act, 1937, which was passed by the Assam Legislature after 1st April 1937. Under that enactment Civil Courts were precluded from executing any decree or order against the person or property of a ward of the Court of Wards, within certain periods prescribed. One of the arguments in support of the contention that it was invalid was that it fell within entry 4 of the Concurrent List, which ran thus: "Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act:" and that there was a repugnancy within the meaning of S. 107 of the Government of India Act. That argument was not accepted, because the subject matter of S. 10-C was not strictly Civil Procedure, and it was also not a matter included in the Code of Civil Procedure. In the course of the discussion relating to this contention, the learned Judge. Narasinga Rau, J. made the following observations:

> "Some difficulty is created by the last part of this item: "all matters included in the Code of Civil Procedure, etc." It so happens that the Code contains certain provisions relating to the jurisd ction and powers of Courts, e g. *see* Part I of the Code. Ss. 9-25 dealing with 'jurisdiction and res judicata', S. 42 dealing with the powers of courts in executing transferred decrees, S. 75 dealing with the power of Courts to issue commissions, and so on But merely because of this, it does not follow that "Civil Procedure" in the Concurrent Legislative List includes everything relating to the jurisdiction and powers of Courts. So to hold would be completely to wipe out the second entry in the Provincial Legislative List: "jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this list". It is true that where the subject might fall either in the Concurrent Legislative List or in the Provincial Legislative List, S. 100 makes the former the dominant list; but this principle cannot apply where the result would be to rob the Provincial entry of all its content".

After citing the case of *In Re Marriage Reference* (9) the learned Judge proceeded to say:—

> "'Civil Procedure' in the Concurrent Legislative List must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters elsewhere in the lists. The provisions of the Civil Procedure Code

* since reported, (1948) M. W. N. 853: Cr. 193, F.B.

7. (1899) A.C. 99 (105-6)
8. (1939) A.I.R. Cal. 628
9. (1912) A.C. 880

itself, whether they are 'Civil Procedure' in this limited sense or not, are of course specifically included in the fourth entry of the Concurrent Legislative List. But we consider that there is no warrant for including in that entry any provisions which are not in the Code and which do not appertain to 'Civil Procedure' in the limited sense explained above".

The observation of the learned Judge that Civil Procedure in the Concurrent Legislative List must be held to exclude matters relating to the jurisdiction and powers of Courts, besides being *obiter*, certainly cannot be supported, if by that is meant that in no case can legislation with respect to jurisdiction and powers of Courts fall within the Concurrent List. That would be equally to rob entry 15 of the Concurrent List of its content. Eeach of the Lists I to III contains an entry, "jurisdiction and powers of Courts". Vide entry 53 of List I, entry 2 of List II and entry 15 of List III, and it should not be overlooked that each of these entries has reference to, and is with respect to, any of the matters in the corresponding List. If the subject-matter falls within either List I or List III, then certainly the Central Legislature has power to make laws affecting the jurisdiction and powers of Courts with respect to that matter. I cannot agree that the decision in *Stewart* v. *Brojendra Kishore* (8) is an authority in favour of the contention of the learned Advocate-General. The observations of Govinda Menon, J. in Cr. M.P. No. 1072, etc. of 1948 do not carry the matter any further because the learned Judge only applied that decision to the facts of the case before him.

The learned Advocate-General, to further strengthen his contention that the subject matter of Act XXVI of 1943 would not fall within entry 2 of List III, argued that it fell within entries 1 and 2 of List II. Clearly entry 2 is not of much help and certainly is not conclusive, because the jurisdiction and powers of all Courts except the Federal Court covered by that entry should be "with respect to any of the matters" in that List It is only when a subject falls within any of the other entries in that List that the Provincial Legislature is empowered to make laws affecting the jurisdiction and powers of all Courts except the Federal Court with respect to such a matter. So, we are thrown back on entry 1. That entry comprises several subjects, and so far as it is relevant, for the purpose of the present discussion, it runs thus:

"......the administration of justice; Constitution and organisation of all courts, except the Federal Court, and fees taken therein;"

The learned Advocate-General tried to maintain that the provision for appeal contained in S. 411-A is a matter which falls within either if not both of these two categories, namely, (1) administration of justice, and (2) constitution and organisation of all Courts except the Federal Court.

"Administration of Justice" is no doubt capable of being understood in a very wide sense, and in that sense, may comprise even the establishment of Courts, providing for the institution, and trial of suits. and provisions regarding appeals and revisions It can take in all civil and criminal proceedings, including execution in civil matters and punishment in criminal matters. In my opinion, the phrase should not be understood in that wide sense in the entry.

Nor would every case of conferment of a right of appeal from an inferior court to a superior court amount to the constitution or organisation of Courts But the learned Advocate-General tried to maintain that by S. 411-A a new Court was being constituted, and therefore, it was only the Provincial Legislature which had the power to pass a law providing for such constitution, as that subject has specially been assigned to it by entry 1 in List II. He referred us to the Act of Parliament contained in 7 Edward VII, c. 23, by which a Court of Criminal Appeal was established in England, consisting of some of the Judges of the Court of King's Bench. That Act is not relevant here, because it cannot be said that the High Court as such did not have appellate criminal jurisdiction before Act XXVI of 1943. Clause 27 of the Letters Patent constitutes the High Court as a Court of Criminal Appeal, and cl. 26 gives the High Court appellate jurisdiction even in respect of sentences and orders passed or made in a criminal trial before the Court of original criminal jurisdiction which may be constituted by one or more judges of the High Court. In my opinion, the power and jurisdiction conferred by cl. 26 is really in the nature of appellate jurisdiction and power (see *Chappan* v. *Moidian Kutti* (10), It has already been mentioned that under S. 449 of the Code the High Court was already a Court exercising appellate criminal jurisdiction in certain cases. The fact that further jurisdiction was superadded to the jurisdiction

10. (1899) I.L.R. 22 Mad. 68 (80), F.B.

already possessed by the High Court does not amount to the constitution of a new Court. I also consider that it would be an undue straining of the language to construe 'organisation' as comprising, providing a right of appeal.

On this point, considerable assistance can be derived from decisions of the Judicial Committee dealing with the interpretation of similar entries in the Canadian Constitution. The distribution of legislative powers between the Dominion Legislature and the Provincial Legislatures is to be found in Ss. 91 and 92 of the British North America Act. It is sufficient to refer to the following provisions:—

S. 91: "...it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming withing the classes of subjects next hereinafter enumerated; that is to say:

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction but including the Procedure in Criminal matters"

S 92: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

14. The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

S. 101: "The Parliament of Canada may notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada."

In *Nadan* v. *The King* (11), it was held that S. 1025 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, was invalid, on two grounds, namely, (1) that it was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865 and (2) that it could only be effective if construed as having an extra territorial operation, whereas according to the law as it was in 1926, a Dominion Statute could not have extra-territorial operation. We are not concerned in this case with either of these grounds, and so, much time need not be spent on this case. But at page 490, there are the following observations which suggest that but for the two grounds of invalidity abovementioned, it would have been a valid provision :—

"The Attorney-General, who argued the case for the Crown, did not contest the view that, having regard to the provisions of S. 1025, it was not open to the Supreme Court of Alberta to give leave to appeal in this case presumably on the ground that the Dominion Parliament, having exclusive legislative authority in respect of the procedure in criminal matters thoughout Canada, had power to deprive the Candian Courts of any jurisdiction to grant leave to appeal in those matters."

I think the implication is that the legislative authority in respect of criminal procedure would include the power to provide for and affect the right of appeal in these matters.

Both the limitations on account of which S. 1025 of the Canadian Criminal Code was held to be invalid in *Nadan* v. *The King* (11) were abrogated by the Statute of Westminster. The extent of the legislative competence conferred on the Canadian Legislature in regard to appeals to the King in Council in criminal matters had therefore to be ascertained from the provisions of the British North America Act, 1867, in the case of *British Coal Corporation* v. *the King* (12). It was there held that s. 91 of the Act, read with the rest of the Act, not by express words, but by necessary intendment, invested the Canadian Dominion Legislature with power to regulate or prohibit appeals to the King in Council in criminal matters. In discussing the effect of the Statute of Westministर, their Lordships point out that in truth Canada was in enjoyment of the full scope of self government, and its Legislature had been invested with all necessary powers for that purpose by the Act, and what the Statute did was to remove the few fetters already mentioned. Their Lordships then observed :

" Among the powers which go to constitute self-government there are necessarily included powers to constitute tha Law Courts and to regulate their procedure and to appoint their judges : save for the provisions of the Act, these powers in regard to the then newly constituted Dominion would

11. (1926) A.C. 482

12. (1935) A.C. 500

have all belonged to the King as the fountain of justice; but by the Act these powers are vested in the Dominion Legislature, and thus *pro tanto* the prerogative is merged in the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is of the Dominion or the Provinces as the case may be."

The learned Advocate General relied on the sentence in which it is said that a part of the administration of justice consists of the system of appeals. But surely it is evident that their Lordships were there not discussing the scope of the entry 14, "administration of justice" in S. 92, but they were using that phrase in a general and popular sense, from the fact that they expressly say that matters of appeal are within the legislative control either of the Dominion or of the Provinces, as the case may be. Their Lordships repelled the argument that the class of appeal with which that case was concerned, was a matter external to Canada, because the Privy Council sits in London, in the following manner:

" As alreadp explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court."

Their Lordships, in conclusion, saw no valid reason since the Statute of Westminister was the power to regulate or prohibit appeals to the King in Council should not be held to be vested in the Dominion Parliaments by the Act with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships, however, pointed out that it was neither necessary nor desirable to touch on the position as regards civil cases. In my opinion, this decision of the Privy Council is opposed to the contention of the learned Advocate-General based on the part of entry 1, "administration of justice."

Though *Attorney General for Ontario* v. *Attorney General of Canada* (13) was decided on a construction of S. 101 of the British North America Act, under which the Dominion Parliament had power to establish a general court of Appeal for Canada, there is one passage at page 152 which lends some support to the contention on behalf of the accused that the words "administration of justice" would not comprise provisions in regard to appeals. It is as follows:

"In coming to this conclusion their Lordshlps do not think it useful to embark on a nice discrimination between the legislative powers contained in Ss. 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine whether the words of head 14 of S. 92, "The administration of justice in the province" would if they were disembarrased of any context, to be apt to embrace legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not. But their Lordships do not make this the ground of their decision; for it is elsewhese, it is in S. 101 of the Act that the solution lies.

The following passage from Clement's Canadian Constitution, Third Edition, at page 539, supports the same conclusion, namely that appeals form part of procedure:

"The assignment to the federal parliament of exclusive authority over "criminal law..............including the procedure in criminal matters" has been held to preclude provincial legislatures from giving a right of appeal in particular instances; so that the creation of an appellate tribunal with a general criminal jurisdiction is futile unless the federal parliament confers the right of appeal in the particular instance As a matter of fact the Criminal Code covers negatively as well as affirmatively almost entirely the whole field of criminal appeals; and so far as such provisions extend they are of paramount authority."

If, for any reason, it should be held that there is a certain amount of overlapping, and such overlapping is bound to occur (vide *P.K. Mukerjea* v. *The Bank of Commerce Ltd., Khulna* (14) then under S. 100 (2), the Concurrent List would prevail, in so far as a particular subject can be said to fall within entries both in List II and List III.

Even assuming that the subject matter of Act XXVI of 1943 falls entirely within any of the entries in the Provincial List, Mr Jayarama Ayyar contended that it is nevertheless valid, because of the special provision contain-

13. (1947) A.C. 127

14. (1947) M.W.N. 346 P.C.

ed in S. 103 of the Government of India Act. It runs thus:

"If it appers to the Legislatures of two or more provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any province to which it applies, be amended or repealed by an Act of the Legislature of that Province."

From the statement of objects and reasons published in the Gazete of India, Parts IV and V relating to Bill No. I of 1943, which subsequently became Act XXVI of 1943, it appears that all Provincial Governments were unanimously in favour of amending the law as provided in that bill. It is useful to extract the statement in full:—

"STATEMENT OF OBJECTS & REASONS

At the instance of the Bombay High Court the Bombay Government proposed to the Central Government in May 1941 that legislation should be undertaken to provide for a restricted right of appeal in criminal cases against the decision of a High Court exercising its original jurisdiction, on the lines contained in the Criminal Appeal Act 1907 (7 Edw. 7 C 23).

The Letters, Patent of the various High Courts prohibit appeal in such cases, but provide a restricted power of review, corresponding to that embodied in S. 434 of the Code of Criminal Procedure, 1898. The Code of Criminal Procedure provides by S. 449 enacted in 1923 to implement a recommendation in the Report of the Racial Distinctions Committee, for appeals from decisions in cases tried befora a High Court by a Jury under the special provisions of Chapter XXXIII but contains no provision for appeals in similar trials not held under that Chapter.

This absence of any general provision for appeals from the decision of a High Court exercising original criminal jurisdiction is perhaps attributable to the state of English law on the subject when the Letters Patent were issued long before the passing of the Criminal Appeal Act, 1907. Provincial Governments and High Courts when consulted upon the Bombay Government's proposal, were unanimously in favour of amending the law in the direction indicated.

The Bill is designed to give effect to the conclusions which have emerged from a collection of opinions expressed by the various authorities consulted.

Mr. Jayarama Ayyar contends that as all the Provinces thought it desirable that the proposed legislation should be undertaken by the Central Legislature, it was lawful for the latter to pass the Act in question.

The learned Advocate-General sought to meet this contention in two ways: First, he said that the condition laid down in the section was not satisfied, because there was no resolution passed by the Chambers of the Provincial Legislature, as those legislatures were not in existence. At the time of the passing of the impugned Act in most of the Provinces, the Governor had issued proclamations under s. 93 of the Constitution Act assuming to himself all the powers vested in the Legislatures. So far as Madras is concerned, the Proclamation clearly stated that the Governor had assumed to himself all powers vested by or under the Act in the Provincial Legislature and all powers vested in either Chamber of that Legislature. I do not see why in these circumstances, it cannot be said that the Resolution of the Governor should not be the resolution such as is referred to in s. 103. The Governor had assumed the powers of both the Chambers of the Legislature and that power would include a power exercisable under s. 103 of the Act. Another way in which the Advocate-General tried to meet the contention was by urging that the impugned Act did not purport to be passed by the Central Legislature in pursuance of action under s. 103. I do not think that if it appears to us that the condition of s 103 is satisfied in fact, an Act passed by the Central Legislature, in the circumstances, should be held to be invalid, merely because it did not appear that the Central Legislature was enacting the law in exercise of the power conferred under s. 103. On the whole, I think there is considerable force in the contention of Mr. Jayarama Ayyar, based on s. 103 of the Government of India Act.

Mr. Jayarama Ayyar also addressed to us an argument bassed on a presumed policy which could be gathered from the distribution of powers, namely, that a certain uniformity of law was contemplated in all the Provinces in matters of general importance, like Criminal Law and Procedure, including rights of appeal, evidence etc. A persual of the subjects con-

tained in the Concurrent List does lend some support to this argument, but I do not think it necessary to rest our conclusions on any presumption of a general policy underlying the distribution of legislative powers between the Centre and the Provinces.

In my opinion, Act XXVI of 1943 is a valid enactment of the Central Legislature, and the appeals are therefore maintainable.

It was a matter for surprise that the objection to the maintainability of the appeal based on an attack on the validity of Act XXVI of 1943 should have been taken on behalf of the Government. S. 411-A had been inserted by that Act and has remained in force for nearly five years, without any objection being taken to its validity. Several appeals including appeals by the Madras Government have been preferred and disposed of on the footing that the new section had been validly inserted in the Code. There was no apparent reason why after the lapse of such a long period the Provincial Government should have suddenly raised this objection. Apart, however, from the lapse of time, there is one circumstance which calls for particular comment. Before the passing of the Act, the Provincial Government was consulted, and it was also at the desire and with the consent of this Provincial Government among other Governments that the impugned legislation was undertaken by the Central Legislature. Having practically invited the Central Legislature to pass the Act in question, it was not proper on their part to have now raised this objection. Presumbly, the Provincial Government was aware of what had taken place before the passing of the Act. But the learned Advocate General was unable to explain why in spite of that, the Government now insisted on taking this objection to the maintainability of the appeals. He did not say that in the opinion of the Provincial Government such a right of appeal as has been conferred by S. 411-A shold not have been conferred. If that were not so, I fail to see why this objection was taken.

The appeals will be posted in due course before the Division Bench dealing with Criminal Appeals.

HORWILL, J: I agree.

RAJAGOPALAN, J: I agree.

N.T.R. ——

Cr. App. Nos. 629, 631, 632, 633 & 663 of 1947
22 & 23 of 1948
October 29, 1948
SUBBA RAO, J.

PUBLIC PROSECUTOR
v.
Illur THIPPAYYA & another.

Evidence Act (I of 1872), s. 57—Essential Supplies (Temporary Powers) Act (XXIV of 1946)—Orders under—Proof—Judicial notice—General Clauses Act, s. 3 (27-A)—"Indian Laws."

Orders passed under the Essential Supplies (Temporary Powers) Act are orders made by a competent authority or person in British India within the meaning of s. 3 (27 a) of the General Clauses Act and are part of Indian Law and courts should take judicial notice of those orders under s. 57 Evidence Act. But under the last paragraph of s. 57 the court is given the discretion to refuse to take judicial notice of any fact unless the person calling upon the court to take judicial notice of such fact produces any such book or document as it be necessary to enable it to do so.

Appeal under s. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the court of session of Bellary division in C. A. No. 23 of 1947, on 19th August 1947 preferred against the judgment of the court of the sub-divisional Magistrate of Bellary in C.C. No. 62 of 1947 on 28th May 1947 etc.

Public Prosecutor (V. L. Ethiraj) for Crown.

B. V. Ramanarasu, V. T. Rangaswami Ayyangar, P. Rami Reddi, P. Chandra Reddi, K. Venkataratnam & M. V. Nagaramiah, for Respt.

JUDGMENT

These are appeals by the Public Prosecutor against the acquittal of the accused in all the cases. The accused in all the appeals were charged under sections 7 and 8 of the Essential Supplies (Temporary Powers) Act 1946 for having contravened the various orders passed by the Government. The following tabular statement shows the orders contravened by the accused in the various cases.

Accused in C.A. No. 629 of 1947	G. O. No Ms. 1026 Food dated 19th November 1946.
Accused in C.A. No. 23 of 1948	Do.
Accused in C.A. No. 631 of 1947	B. P. No. 626 dated 15-5-46.

Accused in C.A. No. 632 of 1947	Do.
Accused in C.A. No. 663 of 1947	Do.
Accused in C.A. No. 22 of 1948	Do.
Accused in C.A. No. 633 of 1947	Clause 4 (1) of the Madras Cloth (Dealers) Control Order, 1946.

The first court convicted all the accused but in appeal the convictions were set aside mainly on the ground that there was no proof of the orders or their due publication. The Public Prosecutor contended that the proof of the said fact was not necessary and the lower court should have taken judicial notice of the said facts under s. 57 (1) of the Evidence Act. The learned counsel for the accused argued that that section of the Evidence Act has no application to the facts to be proved in this case and in any view the lower court had rightly, in the exercise of its discretion, refused to take judicial notice of the facts without the production of the necessary documents

The question to be decided in this case turns upon the construction of s 57 of the Evidence Act. The relevant provisions of s. 57 read as follows:—

> "The court shall take judicial notice of the following facts:
>
> (1) All Indian Laws........
>
> In all these cases and also on all matters of public history, literature, science, or art, the court may resort for its aid to appropriate books or documents of reference.
>
> If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necesssry to enable it to do so."

The scheme of the Evidence Act is clear. Generally all the facts alleged have to be proved in the manner provided by the Act but there are three exceptions; facts admitted, facts presumed and facts of which the court should take judicial notice need not be so proved S. 57 enumerates the facts of which the court should take judicial notice. Under s. 57 (1) the court should take judicial notice of all Indian laws.

"Indian Laws" is defined by the General Clauses Act under s. 3 (27-a) It includes any law, ordinance, order by law, rule or regulation passed or made at any time by any competent Legislature, Authority or person in British India. The question for consideration is whether the orders contravened by the accused are orders within the meaning of this definition. If so, S. 57 (1) of the Evidence Act would apply under s. 3 (1) of Act XXIV of 1946, the Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Under S. 4 of the same Act the Central Government may by notified order direct that the power to make orders under S. 3 shall be exercisable by such officer or authority subordinate to the Central Government or such Provincial Government or such officer or authority subordinate to a Provincial Government, as may be specified in the direction. S. 7 (1) prescribes the penalties for contravention of the said orders.

The aforesaid orders in contravention whereof the accused acted in all the cases were issued in strict compliance with the provisions of this Act by the Government or by authority or persons duly authorised by the Government and they have also been duly notified in the manner provided by the Act. They are clearly orders made by a competent authority or person in British India within the meaning of S. 3 (27 a) of the General Clauses Act and therefore they are part of Indian Law. If the said orders come under the definition of Indian Laws, the provisions of section 57 are attracted and the court should take judicial notice of the same.

But the question still remains whether this is a fit case for interference in these appeals. Though a court should take judicial notice of the fact mentioned in S. 57, it could only take such notice if unimpeachable books or documents are put before it or otherwise accessible for its reference. Under the last paragraph of the section the court is given the discretion to refuse to take judicial notice of any fact unless such person calling upon the court to take judicial notice of such fact produces any such book or document as it be necessary to enable it to do so. In this case no such book or document was placed before the lower court for its reference to enable it to satisfy itself that such order or notifications was in existence. In its discretion the lower court refused to take judicial notice as neither the orders nor the documents showing the publication of such orders

were placed before it. It is therefore impossible to say that the discretion exercised by the lower court is either perverse or illegal.

In the result all the appeals are dismissed.

N.T.R. — *Appeals dismissed*

Cr. M. P. Nos. 1309 & 1911 of 1948

November 18, 1948

SUBBA RAO & MACK, JJ.

A. K. GOPALAN

v.

THE DISTRICT MAGISTRATE, MALABAR & another

Maintenance of Public Order Act (Mad Act I of 1947), S. 2 (1) (a) (Before amendment)—Order of detention—Requirements.

Satyanarayana Rao & Subba Rao JJ:—It is an essential requirement of S. 2 of the Maintenance of Public Order Act that the detaining authority should be satisfied that the detenu is acting or about to act in any manner prejudical to the public safety or the maintenance of public order. Where the order of detention does not disclose on the face of it that the detaining authority addressed itself to the essential requirement of the section, the order is illegal.

A. K. Pillai & A. Ramachandran for Messrs Rao & Reddy, for Petr.

Advocate General (K. Rajah Ayyar,) Public Prosecutor (V. L. Ethiraj) Assistant Public Prosecutor (A.S. Sivakaminathan) & P. Chandra Reddy for Crown.

Petition under S. 491 Cr. P. C. praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* for production before the High Court, Madras the person of A. K. Gopalan a detenu in the Central Jail at Coimbatore to be dealt with according to law and to direct that he be set at liberty.

ORDER [1—10—1948]

SUBBA RAO J. *Cr. M. P. No.* 1309 *of* 1948. This is an application under S. 491 Cr. P. C. The petitioner is A. K. Gopalan. He was the President of the Kerala Provincial Congress Committee in the year 1935. Later on he became a Communist and took a prominent part in the communist organisation. On the 17th December 1947 he was arrested by the Tanarasseri Police and was charged under S. 117 I. P. C., by the Stationary Sub-Magistrate, Cannanore in P. R. C. No. 10 of 1947. It also appears that there were two other prosecutions pending against him in the court of the Sub Divisional Magistrate, Tellicherry under S. 506 I. P. C. On 11th February 1948 he was released on bail by the High Court subject to certain conditions. On 18th March 1948, the conditions not having been complied with, the application for bail was dismissed. On 23rd April 1948 he was detained by an order of the District Magistrate, Malabar purporting to be under S. 2 (1) (a) of the Madras Maintenance of Public Order Act, 1947 (Madras Act 1 of 1947) in the Vellore Central Jail. That order was dated 22nd April 1948. On 11th May 1948 on an application by the petitioner, the High Court enlarged him on bail. Though the Public Prosecutor appeared, it was not brought to the notice of the Court that the petitioner was detained under Madras Act 1 of 1947. Presumbly, for the same reason the Crown might not have taken interest in opposing that application and did not even communicate that fact to the Public Prosecutor. Though the order of detention was passed on 22nd April 1948, the District Magistrate of Malabar intimated to the Government the said fact only on 9th May 1948 and the Government despatched the grounds for detention for service on the petitioner on 27th May 1948 which was received on the next day, 28th May 1948. Meanwhile, the petitioner, on 14th May 1948 itself, sent an application under S. 491, Cr. P. C. to his advocates for presenting the same in Court. The petition was received by the Government and was sent down to the advocates after 25th May 1948. The Ordinance to amend the Madras Act I of 1947 was issued on 25th May 1948 whereunder the power of the High Court under S. 491 Cr. P. C. in regard to detenues under S. 2 of Madras Act I of 1947 has been curtailed. The Government have not yet passed the final order under S. 3, sub-sec. 5 of the Act. The petitioner filed the application under 491 Cr. P. C. for releasing him from the Vellore Central Jail and setting him at liberty on the ground that the order under which he was detained is illegal.

The law on the subject is very well-settled; but in view of the general importance of the right which the section is intended to protect, it is as well that I state it briefly. Habeas Corpus is a high prerogative right and it is a great constitutional remedy for all manner of illegal confinement. In England, it has been described as the Magna Carta of British liberty. The liberty of the subject has always been considered a question of gravest importance in England and no person can be kept in illegal custody for a single minute. In India, especi-

ally after the attainment of Independence, one cannot overstate its improtance. Now that we have attained freedom, it is the sacred duty of this court to see that no citizen of this province, whether he is rich or poor, whether he belongs to this or that political persuasion, is illegally detained for one minute. Of course, this is subject to the restrictions imposed on the personal liberty of the subject by the legislature in its supreme wisdom having regard to emergent situations. But the executive should not be allowed to overstep the boundaries fixed by the Legislature and must prove that the action is strictly within the spirit and the letter of the law. No provision of the statute restricting the liberty of the citizen can be overlooked and no breach of any provision thereof can be condoned on the ground of administrative convenience or pressure of work. Madras Act I of 1947 is one of such Acts which admittedly restricts the individual liberty of the citizen in the interests of public welfare. The relevant sections of the Act read as follows:—

> "2 (1) The Provincial Government, if satisfied with respect to a particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order:
>
> (a) directing that he be detained...........
>
> (2) When any order is made under sub-sec. (1) by an officer or authority empowered under S. 15, that officer or authority shall forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and such other particulars as, in the opinion of such officer or authority, have a bearing on the necessity for or expediency of the order..........
>
> 3 (1) Where an order in respect of any person is made by the Provincial Government under sub-sec. (1) of S. 2 or where any such order is made by any officer or authotity subordinate to them, after receipt of the report specified in sub-sec. (2) of that section, the Provincial Government shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as in their opinion sufficient to enable him to make, if he wishes, a representation against the order; and such person may, within such time as may be specified by the Provincial Government, make a representation in writing to them against the order and it shall be the duty of the Provincial Government to inform such person of his right of making such representation and to afford him opportunity of doing so."

The other sub-sec. to S. 3 empowers the constitution of Advisory Councils for scrutinising and reporting on the propriety of the detention in individual cases. It will therefore be seen that the Act itself provides safeguards against abuse of such unlimited power and also gives an opportunity to the detenu to make adequate and proper representations in time to prevent grave and unintended injustice to a particular individual.

In this case the order under S. 2 (1) (a) of Madras Act I of 1947 was passed by Sri N. S. Arunachalam, District Magistrate, Malabar. The order is in the following terms:

> "Whereas I, N. S. Arunachalam Esq., O.B.E., I.C.S., am satisfied that the detention of A. K. Gopalan is necessary for the maintenance of law and order and public safety.
>
> I direct his detention under S. 2 (1) (a) of the Madras Maintenance of Public Order Act, 1947, in the Vellore Central Jail.
>
> Given under my hand and seal, dated 22nd April 1948.
>
> (Sd.) N. S. Arunachalam,
> District Magistrate."

It is incumbent upon the District Magistrate to satisfy himself that the person to be detained is acting or is about to act in any manner prejudicial to public safety or the maintenance of public order. The order *ex facie* does not show that the District Magistrate satisfied himself that the petitioner was acting or was about to act in a manner prejudicial to public safety. Obviously, he could not satisfy himself on that ground as the petitioner was in custody at the time the order was passed. As aforesaid, he was an under-trial prisoner and his bail application was dismissed on 18th March 1948. It is impossible for the District Magistrate to predicate at that point of time whether the petitioner would be released on bail or would be kept in remand till the criminal cases pending against him were disposed of. It was also not possible for the District Magistrate at that stage to anticipate the result of the criminal proceedings against the petitioner. It might be that the prisoner might be acquitted or it might be that he would be convicted in which case he would

continue to be in jail till the expiry of the period for which he would be sentenced. Presumably, for the said reasons, the District Magistrate was not in a position to satisfy himself within the meaning of the section that the petitioner was acting or was about to act in any manner prejudicial to public safety and therefore, as stated in his order vaguely, that the order of detention was necessary for the maintenance of law and order and public safety. This order is not in strict compliance with the provisions of s. 2 and therefore it cannot be deemed to be an order passed under that section.

The District Magistrate made another glaring mistake. Under sub-sec. (2) of s 2 the Magistrate shall forthwith report that fact to the Provincial Government together with the grounds on which the order has been made. It is admitted that it was only on 9th May 1948 that the District Magistrate, Malabar intimated to the Government the fact of the issue of the said order of detention. The delay is of sixteen days. The word 'forthwith' is clear and unambiguous and however it is interpreted, it would be doing violence to the language to hold that the order communicated after sixteen days could be said to have been communicated forthwith. The learned Public Prosecutor stated that the delay was due to pressure of work and was not intentional. When the statute with a purpose contains a mandatory provision directing an officer that he shall forthwith report the fact to the Government, it is not open to the officer concerned to say that he could not comply with the provisions because of administrative convenience. Such arguments, if accepted, would be a great infringement on the liberty of a citizen and would be leaving him at the mercy of an officer who may communicate the order at his own leisure. The Government received the order on 9th May 1948 and communicated the grounds for detention on the 27th May 1948, i. e. the petitioner was detained in prison for a period of five weeks without being informed why he was detained. The non-compliance of the provisions of sub-sec. 2 also must be deemed to have caused prejudice to the petitioner.

The learned Public Prosecutor relied on a decision of the Federal Court in *Basanta Chandara Ghose* v. *Emperor* [1]. The detenu in that case was arrested on 27th March 1943 under an order dated 19th March 1943 purporting to be made by the Governor of Bihar in exercise of the powers conferred by rule 26 of the Defence of India Rules. Though the application was filed on 28th April 1943, it was not disposed of till Feb. 1944 and meanwhile Ordinance III of 1944 was promulgated on 15th Jan. 1944. On 3rd July 1944 the Governor of Bihar passed two orders one cancelling the order of detention of 19th March 1943 and the second directing the detention of the appellant on the ground that it was necessary so to do "with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and efficient prosecution of the war". The learned Chief Justice held that when the earlier order of detention was held defective merely on formal grounds, there was nothing to preclude a proper order of detention being based on the pre-existing grounds themselves and that there was no force also in the contention that no order of detention could be passed against a person who was already under detention. The only point that was raised and decided in that case was that the detention though illegal under the previous order, was legal under the subsequent order passed by the Government and the fact that the order was passed when the petitioner was under detention pursuant to an illegal order did not preclude the Government from passing a legal order detaining the petitioner. The judgment is of no help in deciding the present case as the provisions which were under consideration in that decision are in no way analogous to the provisions of S. 2 which I have got to construe in this case. Another decision relied on by the respondent is that of Wanchoor J. in *Mool Chand* v. *Rex* [2]. That case arose under U.P. Maintenance of Public Order (Temporary) Act (IV of 1947). The provisions of that order are not *pari passu* with the provisions of Madras Act I of 1947. The only question raised and decided in that case was whether the action was mala fide. It was argued in that case that the executive authorities acted mala fide in detaining the petitioners under that Act when they found that there was no case against them under certain specific provisions of the Penal law. The learned Judge after considering the various circumstances, negatived the contention that there was only mala fides on the part of the Government. That case also has no bearing on the question to be decided in this case. *Hirji Shivram Vyas* v. *Commissioner of Police* [3] has been cited

1. [1945] M. W. N. 445 : Cr. 91
2. [1948] A.L. J. 81
3. [1948] 50 Bom. L.R. 210

before me. That case arose under Bombay Public Security Measures Act. The only question decided in that case was whether the Government acted mala fide in detaining the petitioner. On a consideration of the various circumstances, the learned Judge came to the conclusion that the Government's order was bad for want of bona fides. The observations of the Chief Justice in regard to the construction of the word 'is acting' do not in any way support the respondent's contention.

The learned counsel for the petitioner raised two more contentions (1) that the Government in this particular case acted mala fide and (2) that the order of the Government communicating the reasons under S. 3 (1) of the Act, was not issued by or under the name of His Excellency the Governor. It is unnecessary to give any final decision on these two points as I have held that the order in question did not comply with the requirements of S. 2 (1) which was the necessary foundation for its validity.

In the result and for the reasons stated above, I hold that the order of detention was bad and therefore I direct that the detenu A. K. Gopalan be set liberty forthwith.

Cr. M. P. No. 1911 *of* 1948. For the reasons mentioned in my judgment in Cri. M.P.No. 1309 of 1948, I allow this application.

MACK J. *Cr. M. Ps. Nos.* 1309 *and* 1911 *of* 1948. I have had the advantage of perusing my learned brother's judgment with which I am, with great regret, constrained to disagree, as the question involves is the liberty of a subject. The petitioner, A. K. Gopalan, in the applications under S. 491 Cr. P. C. was arrested under the ordinary law on 17–12–1947 in connection with a public speech he made at Calicut on 5–12–1947 containing, it is alleged, incitement to murder. He was charged under S. 302 I. P. C. read with S. 117 I. P. C. and is under trial for this serious offence. He was directed to be released on bail by the High Court in Cr. M.P. No. 193 of 1948 on the 11th Feb. 1948 on substantial security on conditions that except on the days when he was being actually tried he should not be in Malabar District, and that if on other days he was found within this District he would forthwith be arrested. He was duly released but was re-arrested on the 6th March for alleged breach of this condition. He then filed Cr. M.P. No. 460 of 1948 in the High Court again asking for bail. It was dismissed by the same learned Judge who dealt with the first bail application on representation by the Public Prosecutor that the petitioner came to Calicut in breach of his bond, was found giving instructions to his confederates, when he was arrested and that he escaped from custody and had to be again arrested at the railway station. It was while he was on remand in the Cannanore Sub Jail that the District Magistrate, Sri N. S. Arunachalam, on 22-4-1948 issued an order for his detention under s. 2 (1) of the Madras Maintenance of Public Order Act basing it on the ground that he was "satisfied that the detention of A. K. Gopalan is necessary for the maintenance of law and order and public safety". In pursuance of this order the petitioner was removed to the Central Jail, Vellore as detenu No. 803. Unfortunately the District Magistrate did not despatch a copy of his detention order to the Government till the 9th May, though s. 2 (2) requires him to do so forthwith. On 31–5–1948 Cr. M. P. No. 1309 was filed in this court under s. 491 Cr. P. C., for his release supported by an affidavit from the petitioner in which he alleged that he handed over to the Superintendent of the Vellore jail an affidavit on the 1st May 1948 and a letter containing instructions to file a petition in the High Court for his release, but that the Jail Superintendent sent his letter to the Government of Madras. However this may be, an application for bail, Cr. M. P. No. 1014 of 1948, was filed in the High Court on 6–5–48 during the vacation, and his release on bail was directed on 11–5–48 with a slight relaxation of the conditions imposed originally that he should not be in Malabar District except in connection with his trial and on the day prior to it and subsequent to it only, i. e. for an aggregate period of three days in all, and that he would be liable to be remanded if he contravened this direction on any occasion. There is nothing on record to show in Cr. M. P. No. 1014 of 1948 which we have called for and perused along with the bail applications presented to this court that the learned Judge was aware that a detention order had been passed by the District Magistrate against the petitioner under s. 2 (1) on 22–4–1947. Such an order can of course be legitimately passed on material available to the Provincial Government or the District Magistrate outside the narrow scope of the information or material laid before a criminal court relevant only to a specific offence alleged to have been committed on which it can within the exercise of a rather limited discretion direct the release of an accused person on bail. There is nothing therefore inconsistent or in conflict

between the bail order of the High Court directing the release of the petitioner on bail, and the order of detention issued by the District Magistrate which however so long as it is in force renders the bail order inoperative.

The petitioner has filed a second petition, Cr.M.P. No. 1911 of 1948, from the Coimbatore jail to which he has since been removed, accompanied by another affidavit asking for his release. I have considered both his affidavits in arriving at my decision. In his second affidavit he complains, *inter alia*, that as far as letters, interviews, and legal facilities are concerned they are more limited than that of an ordinary prisoner, and that a detenu is not allowed to correspond with his friends.

Mr. Pillai has sought to bring the case of the petitioner within categories 3 and 4 of the Full Bench decision. It will be remembered that the Madras Maintenance of Public Order Act, 1947 was held by the Full Bench of our Court to be *intra vires*, despite S. 16 which laid down that,

> "No order made in exercise of any power conferred by or under this Act.......shall be called in question in any court."

S. 16-A, a subsequent amendment, which sought to oust even the powers of this Court altogether under Habeas Corpus applications under S. 491 Cr.P.C. was held to be superfluous and has, subsequent to the Full Bench decision, been repealed. The Full Bench has held following the most recent English case law on the interpretation of a similar Public Safety and Order Act that the High Court has a residuum of power and jurisdiction to interfere and set at liberty a person detained under S. 2, if his case can be brought within one of four categories only :

> "(1) When the order is not duly authenticated, as for example, when it is passed by an officer or authority not empowered under S. 15 of the Act ;
>
> (2) When the person detained in pursuance of the order is not the person intended to be detained, that is to say, when there is a mistake of identity ;
>
> (3) When there is a lack of *bona fides*; and
>
> (4) When it is established that the essential requirement of S. 2, namely, the satisfaction of the Provincial Goverment or an Officer or other authority empowered under S. 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under s. 2(1) of the Act, is not present. If it is established that neither the Provincial Government nor the officer or other authority empowered under s. 15 has exercised its or his mind on the material placed before it or him, then an order of detention, though purporting to be passed under s. 2 (2) must be deemed to be not an order under s. 2."

It appears to be clear to me that, on the basis of this decision by which I am bound, a mere breach of a directive provision, even a mandatory provision, will not *per se* be a valid ground for setting aside a detention order, though such a breach, if proved, will of course be perfectly relevant as helping to show that the order of detention lacked *bona fides* under the third category.

The most important contention of Mr.Pillai, which my learned brother has allowed, is that the District Magistrate's order of detention is not in strict compliance with s. 2 (1), that it cannot be deemed to be an order passed under that section and presumably that the petitioner's case will therefore fall under the fourth category. Under s. 2 (1) the Provincial Government or the District Magistrate on whom the powers of detention have been conferred under s. 15 has to be satisfied that the person in question "is acting or about to act in a manner prejudicial to the public safety or the maintenance of public order" and "with a view to preventing him may order his detention." The contention is that as the petitioner was in custody in a jail on the date of the detention order, 22—4—1948, and have been there for some weeks, the District Magistrate could not have been in a position to satisfy himself that he was acting or about to act in a prejudicial manner.

The argument boils down to this that under s. 2 a detention order cannot legally be issued against a person if he is already in jail, whether on remand on a specific offence with which he is charged or while remanded to custody under s. 151 Cr.P.C. In Cr.M.Ps. 1090 and 1091 of 1948, a Bench consisting of Govinda Menon, J. and myself dismissed two similar petitions by two persons, Somasakhara-chari and K. Poornachandra Rao, against whom detention orders were passed *after* their arrest under the ordinary law. In their cases charge-sheets were laid under s. 110 (e) and (f), and the Sub Divisional Magistrate had no option but to direct their release on bail if sureties were forthcoming. Those cases were sought to be brought by the learned advocate only under the third category on the ground

that the detention orders were vitiated by a lack of bona fides. The position that the orders were not in compliance with s. 2 (1) and therefore fell into the fourth category was not pressed and argued before that Bench. It would however follow that if I accept the present contention and agree with my learned brother, then those detention which we held to be legal would also fall into the fourth category.

The important portion of the fourth category in the Full Bench decision is as it appears to me its amplification in the second part, viz. "if it is established that neither the Provincial Government nor the officer or other authority empowered under s. 15 has exercised its or his mind on the material placed before it or him......" I do not think a technical violation of s. 2 (1) in not reproducing its exact words in the detention order will by itself bring this case into this exceptional category. The substance, not the form, of s. 2 (1) has, I think, to be shown to be violated. It is quite clear in my opinion that the mind of the District Magistrate primarily responsible for law and order within his district was very greatly exercised over the activities of the petitioner and particularly at the possibility of his being released on bail, and that he issued the detention order as a precautionary measure to ensure his detention which as he said in his order he considered "necessary for the maintenance of law and order and public safety." This is substantially tantamount to satisfaction that he will act in a manner prejudicial to the public safety if released. The wording of s. 2 (1) is unhappy and in a sense difficult to apply literally to a person actually in jail at the time the order of detention is passed. But there may be cases in which although in an ordinary jail, a person may be actually acting or about to act in a manner prejudicial to public safety apprehensions of which may fully justify his removal as a detenu to another jail there to be more closely watched. Technicality may be met by technicality by an argument that even the attempt by the petitioner to obtain his release on bail, which he was of course entitled to strive for, may itself in special circumstances on information at the disposal of the detaining authority be itself regarded as an act though *per se* lawful nonetheless prejudicial to public safety, if they are satisfied that he will misuse his liberty by inciting people to acts of violence. S. 2 does not stipulate that the act prejudicial to public "safety" should itself be unlawful.

A serious obstacle to my mind to the acceptance of the contention that an order under S. 2 cannot be legally issued against a person while he is actually in jail is that, if upheld, it will place a person who has given cause for his arrest by alleged acts in breach of existing ordinary law in a far more favourable position in the matter of detention orders under this Act than the person who has given no such cause for arrest, his own misdeeds as it were protecting him from a detention order under the Act. I do not think this is what the legislature intended when it enacted S. 2 I am unable to see that the issue of a detention order against a person already in jail in some other connection is *per se* illegal according to the wording of S. 2(1) as it stands.

Let me now examine the grounds on which the petitioner's detention was ordered. They are contained in a Government of Madras Public Memo dated 25th May signed by the Chief Secretary. According to it the petitioner became the president of the Kerala Congress Committee in 1935, resigned later and concentrated on the labour movement and began to propogate Communism in several districts. He was bound over under S. 109 Cr.P.C. and was in prison for 9 months. He was in 1940 sentenced to a term of imprisonment in absentia by the High Court for failure to appear in court in connection with another criminal charge. He was arrested on 28—2—1941 but escaped from the Vellore Central Jail on 24-9-1941. Appearing at a public meeting in connection with a rally day of the Commnuist Party on 11-11-1941 he was again arrested. After his release he is said to have started a campaign of vilification of the authorities and incitation of the masses to violence. An interim bond under S. 112 Cr.P.C. was taken from him when he contested an election on the Communist ticket for the Calicut General Constituency. Later he was proceeded against under Ss. 107 Cr. P. C. and 506 I.P.C. though the grounds do not say whether successfully or not. He is said to have visited Ceylon and collected Rs. 8,000 for Communist Party funds. He was arrested on 23—1—1947 under the Public Safety Ordinance but released on 2—10—1947. In his second affidavit in support of Cr.M.P. No. 1911 of 1948 which he filed from the Central Jail, Coimbatore he complains that though the Government first mentioned his name in the list of persons to be released in the general amnesty of Independence Day he was not released, and after some vain representations

to the Government he went on hunger-strike for 11 days and was then released condionally on 1st October 1947. The grounds then detail his activities after his release, many of which appear to be perfectly legitimate criticism of Government policy of high placed Ministers of the Government of India, denunication of blackmarketing and so on. But mingled with all this — and what constitutes the real gravamen of the indictment is his alleged continuous incitation of the masses to violence which led to his arrest on a charge of incitment to murder. In his affidavit in which there is in favour of the petitioner no attempt to conceal incidents in his record he says also that two further charges under s. 506, I. P. C., are pending against him. A most serious allegation in the grounds is that the Communist Party which he leads in Malabar District is now indulging in violence and subversive activities, that most of the important members of the Party have gone underground with every prospect of the petitioner doing likewise and from there were guiding various grave crimes such as arson, looting and murder, being committed by Communists. I can only consider these serious indictments at their face value on the presumption that they are made with a sense of responsibility by those on whom there rests the heavy burden of maintaining law and order in these difficult times.

There is another important factor for which a court has to allow under this statute held to be *intra vires*, that the Government is entitled under s. 3 (1) to withhold grounds within their exclusive knowledge which they consider it would be against the public interest to disclose. Apprehensions that the petitioner was preparing to go underground and direct subversive activities on adequate grounds, apart from anything else justify a detention order under s. 2 although the petitioner was in jail when the order was passed.

In view of the petitioner's past history and his activities set out in the grounds and in his own affidavits, it is not possible for me to hold that the District Magistrate did not exercise *his mind on the material placed before him* when as a *precautionary measure he issued the detention order* on the lines he did. As I said before and for these further additional reasons I am unable to find that merely because the District Magistrate's order *did not reproduce the exact words of s. 2 his detention order is liable to be set aside as* being no order at all under this section and as coming within the fourth category of the Full Bench decision.

The second ground which weighed with my learned brother is the failure of the District Magistrate to send a copy of the detention order dated 22—4—1948 forthwith to the Government as required by s. 2 (2) of the Act. He despatched the order on 9—5—1948 after 17 days, the delay being explained by the learned Public Prosecutor as due to administrative strain consequent on Communist disturbances. The main reason for this direction to District Magistrates in the statute is that a person arrested on a detention order should be given as early an opportunity as practicable of making his representations against the order. As the petitioner was in jail throughout this period and was not arrested on the basis of the detention order the delay has not prejudiced the petitioner very much. There are several mandatory directions in the Act. A breach of any of them *per se* cannot come within any of the four categories and make a detention order liable to be set aside. Such breaches can however in my view be used as relevant material to establish lack of bona fides and bring a case under the third category. The delay may indeed reflect and be due to the great strain imposed on the Collector and his district administration, and the word "forthwith" can reasonably mean nothing more than "as soon as possible" taking administrative exigencies into consideration.

As regards lack of bona fides alleged I am unable to find any material to show that there was any political animosity underlying the order, on the part of the Government in power against a prominent member of an opposing party. There is, on the other hand, cogent material and every indication that it was passed perfectly bona fide by the District Magistrate in discharge of his onerous responsibilities of maintaining law and order and of protecting the freedom and liberty of the inhabitants of his district which in his considered opinion had become gravely endangered by subversive activities which were taking a very violent turn. I entirely agree with my learned brother that a statute like this depriving a subject of his liberty should be strictly construed. But as I read the grounds of detention a wider liberty and a wider freedom are likely to be gravely threatened if liberty is accorded to an individual likely to abuse it by inciting people to violence by arson, loot and murder. In such a case I think there should be a more liberal construction of the statute in favour of the

wider freedom likely to be imperiled, that under which we Judges, administer justice without any interference whatsoever from executive authority under which Mr. Pillai is entitled and enabled to argue before us for hours if not days together with leisurely and seductive ability on the liberty of the subject and under which we, Judges, are entitled to a free expression of our opinion in a case before us even in disagreement with each other, one of the great privileges of a free democracy. I am not therefore inclined in this case to *place too strict a construction in favour of the individual, when these liberties come into conflict.*

A technical point has been raised by Mr. Pillai, viz. that the Government Memorandum containing the grounds of detention should have been signed by the Government and not by the Chief Secretary. Mr. Pillai raised the same point in Cr.M.P. No. 102 of 1948 before a Bench consiting of Govinda Menon, J. and myself. As Mr. Pillai seeks an independent finding here, I shall merely incorporate the relevant portion of the judgment delivered by Govinda Menon, J. in that petition:

> "According to s. 59 (1) of the Constitution Act, all executive actions of the Government of the Province shall be expressed to be taken in the name of His Excellency the Governor and since on the face of the order of the Government it does not appear that the action was taken in the name of His Excellency the Governor learned counsel, strenously contends that the order of detention does not conform to the Act. Even if this is a defect, we are of opinion that it is only one of form and not of substance. In *Gas Plant Manufacturing Co. Ltd.*, v. *Emperor* [4], the Federal Court has decided that where instead of the words "Governor-General in Council" a particular order referred to the Central Government, the contention that the order was invalid has to be rejected. The learned Public Prosecutor also invited our attention to sub-sec. 2 of section 59 of the Constitution Act which states that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called into question on the ground that it is not an order or instrument made or executed by the Governor. He also informs us that there are rules made under the sub-section empowering the Chief Secretary to issue the order on behalf of the Governor. We are not inclined to accept the contention of the learned counsel for the petitioner that the Government order dated the 8th April 1948 was not issued by order of His Excellency the Governor as contemplated in s. 59 (1) of the Constitution Act. This contention has therefore no force."

For these reasons I find that the petitioner's case cannot be brought within either category No. 3 or category No. 4 of the Full Bench decision and that these petitions should be dismissed."

SUBBA RAO, J.—As my learned brother differed from me, this matter will be placed before the Chief Justice for orders as to posting before a third Judge.

OPINION (17—11—1948)

SATYANARAYANA RAO, J.—These applications have been placed before me by an order of the Chief Justice as there was a difference of opinion between Subba Rao, J. and Mack, J. when they were heard by them in the first instance. At the outset it is to be observed that the learned Judges who differed in their opinion should have stated the point upon which they differed as the proceedings under s. 491, Cr. P. C. are governed when there is a difference of opinion by cl. 36 of the Letters Patent and not by s. 429, Cr. P. C. The jurisdiction exercised by the High Court under s. 491, Cr. P. C. is not an appellate jurisdiction and therefore s. 429 of the Code does not apply. The proceedings are analogous to be proceedings under s. 195 of the Code before it was amended in 1923. A Full Bench of our Court decided that the power conferred upon the High Court by s. 195 (6) of the Criminal Procedure Code before the amendment in 1923 is not a part of appellate or revisional jurisdiction of this court conferred by chapters 31 and 32 of the Code of Criminal Procedure. "It is a special power conferred by s. 195 (6). It follows therefore that when the Judges are equally divided, the case is governed by s. 36 of the Letters Patent and not by s. 429 or s. 439 of the Code of Criminal Procedure." The learned Judges therefore ought to have formulated the point on which they differed. The learned counsel appearing for the petitioner and the learned Advocate-General appearing for the respondent have, however, agreed that the question dealt with in the judgment of Subba Rao, J. may be

4. [1947] M.W.N. 393: Cr. 85

taken as the point on which the learned Judges differed. In order to obviate the necessity of a further reference back I have accepted this suggestion.

The facts of the case have been fully set out in the judgments of Subba Rao, J. and Mack, J. It is therefore unnecessary for me to repeat the facts *in extenso* in this judgment. In both the applications the petitioner is the same and the relief sought is also the same. The District Magistrate of Malabar passed an order dated the 22nd of April 1941 directing the detention of the applicant under s. 2 (1) (a) of the Madras Maintenance of Public Order Act, 1947 (Madras Act I of 1947). The order was served on the petitioner on the 23rd of April 1948. At the time of the passing of the order, the petitioner was in jail as an under-trial prisoner. He was in jail from 17th of December 1947 as an under trial prisoner till now except for a break between the 11th of February 1948 and the 6th of March 1948 when he was released on bail. On 6th May 1948 this Court in Cr.M.P. No. 1014 of 1948 directed the release of the petitioner on bail and when that order was passed this court was not aware of the fact that there was a detention order already passed by the District Magistrate under the the Madras Maintenance of Public Order Act, s. 2 (1) (*a*).

These petitions were filed by the detenu questioning the legality of the order of the District Magistrate on various grounds. Subba Rao, J. was of opinion that the order of detention was *ex facie* bad and that the petitioner should be released forthwith. Mack, J. was of opinion that the petition should be dismissed as in the learned Judge's opinion the order of detention was legal.

A Full Bench of this Court recently examined the provisions of the Madras Maintenance of Public Order Act and the provisions of the subsequent Ordinance II of 1948 amending the Act and promulgated by the Government of Madras, and laid down the limits of the jurisdiction of this Court to interfere and set at liberty under s. 491 of the Criminal Procedure Code a person detained under s. 2 of the Act. The residuum of power and jurisdiction of this Court to interfere is classified under four categories by the learned Chief Justice. These have been set out also in the judgment of Mack, J. The petitioner therefore must bring the order of the District Magistrate within one or more of the categories in the judgment of the Full Bench and has attempt is to bring it under categories (c) and (d).

The order of the District Magistrate, Malabar, dated 22nd April 1948 is as follows:—

"Whereas I, N. S. Arunachalam, Esq., O.B.E.I.C.S., am satisfied that the detention of A. K. Gopalan is necessary for the maintenance of law and order and public safety. I direct his detention under s. 2 (i) (a) of the Madras Maintenance of Public Order Act, 1947, in the Vellore Central Jail.

Given under my hand seal, dated 22nd April 1948.

Sd. N. S. Arunachalam
District Magistrate."

In my opinion this order is bad on its face and falls within the fourth category which reads as follows :—

"(d) when it is established that the essential requirement of s. 2, namely, the satisfaction of the Provincial Government or an officer or other authority empowered under s. 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under s. 2 (1) of the Act, is not present. If it is established that neither the Provincial Government nor the officer or other authority empowered under s. 15 has exercised its or his mind on the material placed before it or him, then an order of detention, though purporting to be passed under s. 2 (2) must be deemed to be not an order under s. 2."

As laid down by the Full Bench it is not open to this Court to consider the reasonableness of the material on which an order of detention was made, nor canvass the grounds of the order when they are given, and see whether the grounds so given in the opinion of this Court justify the order. The very foundation of the exercise of jurisdiction under s. (2) (1) (a) of the Act is the "satisfaction" of the detaining authority that the person concerned *is acting* or is *about to act* in a manner prejudicial to public safety or the maintenance of public order and if there is such satisfaction the authority concerned with the object of preventing the person from so acting could direct his detention. This is treated by the Full Bench, as is clear from the passage already quoted, as an essential requirement of s. 2. If this requirement is

lacking, the order of detention is without jurisdiction and the detention is illegal. The order of the District Magistrate does not disclose that he had addressed himself to the only question on which he should be satisfied, because his order merely states that he was satisfied that "the detention was necessary for the maintenance of law and order and public safety". That is not the question on which according to the section he should be satisfied. A man's detention may be necessary for various reasons either because of his past conduct or because he is a man of bad character, but the Act does not justify the detention of the person and deprivation of his liberty under such circumstances. The only ground on which a detention can be justified under s. 2 is that the detaining authority is satisfied that the person *is acting* or *is about to act* in a manner prejudicial to public safety etc. This narrows down the scope of the material which can properly be considered as justifying an order under the section. It is not a mere technicality as Mack, J. has thought, but it is an essential requirement of the section. The authority according to the section and according to the interpretation placed upon it is not bound to give the reasons for his "satisfaction' in the order of detention, nor is he bound to disclose the material on which his 'satisfaction' is based. The 'satisfaction' is a subjective state of mind and can be known only by what is recited in the order. The essence of the matter is that by reason of the threatened acts there is justification for depriving him of his liberty as the activities are such as are prejudicial to public safety and the maintenance of public order and that they should be curbed and the person prevented from continuing or launching on such activities. As the order does not disclose on the face of it that the District Magistrate, the detaining authority, had addressed himself to the only question to which he should have confined his attention, the order is illegal.

Mack, J. observes in justification of the order of the District Magistrate, "It is quite clear, in my opinion, that the mind of the District Magistrate primarily responsible for law and order within his district was very greatly exercised over the activities of the petitioner and particularly at the possibility of his being released on bail, and that he issued the detention order as a precautionary measure to ensure his detention which as he said in his order he considered 'necessary for the maintenance of law and order and public safety". With respect to the learned Judge I am of opinion that these considerations are entirely foreign and should not enter into consideration when passing an order under s. 2 (1) (*a*) of the Act. It is not the entire field of his activities that is open for consideration under s. 2 (1). The language used is "is acting or about to act". To what extent it is permissible in view of this language to take into consideration the past activities of the person concerned is a question dfficult to decide, but it does not arise for consideration in the present case. It would seem however that a limit should be drawn *and that all* the past activities of the person should not be taken into consideration in making the order. The detaining authority is not entitled, in my opinion, to go beyond the proximate past as the reason for the order of detention is that the present activities of the person are such as to endanger public safety and should be immediately prevented. The object of the section is prevention and not punishment. The fact that a man who is already in jail is about to be released may not by itself be a proper ground for making the order as it would savour of lack of *bona fides* on the part of the authority concerned, The complaint of the petitioner is not that the District Magistrate did not reproduce the exact words of s. 2 in his order, but that the District Magistrate failed to consider the only question which is relevant for making an order of detention under the section. The section requires that the authority concerned should exercise its reasoning powers on the material placed before it in order to reach a satisfaction on the question whether the activities of the person concerned are such that his liberty should be restrained in the interests of public safety. The order under s. 2 (1) should be the result of the exercise of the reasoning faculties of the authority and not merely of the mechanical reproduction of the words in the section.

Subba Rao J. was of opinion that as the District Magistrate did not report the fact of detention to the Provincial Government together with the grounds on which the order was made till after seventeen days and not immediately as required by s. 2 (2), the petitioner was also prejudiced. It may be so, but I doubt very much whether if the original order of detention is valid, the fact of detention along with the grounds was not commu-

nicated to the Provicial Government immediately would by itself make the original order of detention, illegal. It is however unnecessary for me to consider this aspect, as I am satisfied that the order of detention is on the face of it illegal. I may, however, observe that the word "forthwith" means "immediately" and "without delay" and not "as soon as possible", as Mack, J. held. The reason why the fact of detention along with the grounds should be communicated forthwith it seems to me, is to ensure that the authority before making the order had material before him, considered the pros and cons of the question and made up his mind to pass an order of detention. If the reasoning should precede the order of detention there is no necessity for delaying the recording of those reasons. It is a kind of guarantee that the authority had all the material before him when passing the order and not that he made the order first and was trytng to justify his order by material and reasons discovered later. It may be a question for consideration in cases where the fact of detention along with the grounds were not communicated immediately whether really the detaining authority had the material before it at the time the order was made. If a person was in jail for a long time as in this case and thus was prevented from indulging in activities of any kind, it may be a matter for consideration whether there could be any material to justify an action under s 2 (1). Both the learned Judges have considered this question also and differed in their opinion. In the view I have taken it is not necessary for me to go into these questions in the present case.

I am satisfied that the order of detention in the present case is bad on the face of it and that as the essential requirement of s. 2, namely, the satisfaction of the Magistrate that the petitioner is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order is lacking in the present case, the order of detention is illegal, and I agree with Subba Rao, J. that the petitions should be allowed and that the detenu, A. K. Gopalan, should be set at liberty forthwith.

JUDGMENT

(Subba Rao, J.)

Pursuant to the opinion expressed by Satyanarayana Rao, J. we direct that the detenu, A. K. Gopalan be set at liberty forthwith.

N.T.R.

Cr. R. C. No. 865 of 1947
Cr. R. P. No. 755 of 1947

November 4, 1948

Rajagopalan, J.

ALAGIRISWAMI NAIDU
v.
Chinna VEERAMMAL & another

Cr.P.C. (V of 1898), s. 146 (1)—Attachment under—Jurisdiction to order.

Petitioner and counter-petitioner each claimed exclusive possession of the land in dispute. The magistrate, before whom proceedings under s. 145 Cr.P.C. were initiated, reached the conclusion that neither side was in exclusive possession on the date of the preliminary order and that the evidence on record did not establish conclusively that either side had been dispossessed within two months before the order.

Held, *that the magistrate was entitled to order attachment of the property under s. 146 (1).*

Even when the magistrate finds that both the petitioner and the counter petitioner were in possession of the land in dispute on the date of the preliminary order, the magistrate can order an attachment under s. 146 (1).

Petition under ss. 435 and 439 Cr.P.C. 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate of Sivakasi in M. C. No. 1 of 47 dated 15th May 1947.

K. Veeraswami, for Petr.

V. Ramaswami Ayyar, for Respt.

Public Prosecutor (V.L. Ethiraj) for Crown.

ORDER

The petitioner and the 2nd counter-petitioner—counter-petitioner 1 is the mother of the counter petitioner 2—each claimed exclusive possession of the land in dispute. The learned Magistrate before whom proceedings under s. 145 Cr.P.C. were initiated reached the conclusion that neither side was in exclusive possession on the date of the preliminary order (18-1-1947), and that the evidence on record did not establish conclusively that either side had been dispossessed within two months before the order. The learned Magistrate ordered the attachment of the property under s. 146 (1) Cr.P.C. The petitioner seeks to have that order set aside in revision.

The learned Magistrate was certainly entitled to rely upon the oral evidence of the Village Headman C. W. 6.

> "He (C.W. 6) says that each cultivated half, petitioner and counter petitioner 2. I do not for a moment disbelieve the evidence of this witness who is very straight forward."

Considering that it was a six month crop that was raised when C. W. 6 harvested it the learned Magistrate was certainly right in his observation.

> "With regard to recent possession, it cannot be definitely said who was in exclusive possession."

I am unable to see any real substance in the contention put forward by the learned advocate for the petitioner, that on the evidence on record the learned Magistrate should have come to the conclusion that the petitioner was in exclusive possession of the land. To reiterate, the learned Magistrate was entitled to rely upon the oral testimony of C. W. 6. There was nothing in the documentary evidence to indicate with any finality that, if the second counter petitioner got any possession at all it must have been within two months before the date of the preliminary order.

The learned advocate for the petitioner relied on *Mohammad Koolayappa Rowthan* v. *Sheik Abdul Khadir Rawthan* (1) which was followed in *Errappa Reddi* v *Guruswami Reddi* (2) and contended that, once the learned Magistrate came to the conclusion that both the petitioner and the counter petitioner were in possession of the land in dispute on the date of the preliminary order, the learned Magistrate had no jurisdiction at all to order an attachment under s. 146 (1) Cr.P.C. In *Mohammad Koolayyappa Rowthan* v. *Sheik Abdul Khadir Rowthan* (1) while setting out the facts of the case, Seshagiri Aiyar, J. observed:

> "The petitioner complained..........that the counter petitioner was preparing to commit a breach of the peace by forcibly entering upon properties which were in his exclusive possession. The defence was that the properties in dispute were the joint properties of the petitioner and the counter-petitioner and "that they are in their joint enjoyment". The Magistrate ....came to the conclusion that the allegation of the counter-petitioner as regards item 3 was true".

The facts of this case are totally different. Each side claimed exclusive possession, and what the learned Magistrate found was that some time before the date, of the preliminary order more than two months prior to the date of the preliminaary order, counter-petitioner 2 managed to get into possession of a portion of the land in dispute. I am unable to see any authority in *Mohammad Koolayappa Rowthan* v. *Sheik Abdul Khadir Rowthan* (1) for the extreme position contended for by the learned advocate for the petitioner, that once a conculsion is reached that both the parties were in possession of portions of land in dispute on the date of the preliminary order, no matter how recent was that possession of one or the other, the court loses all jurisdiction vested in it under S. 146 (1) Cr. P. C.

I see no justification for any interference in revision. The petition is dismissed.

N.T.R. — *Petition dismissed.*

1. (1914) 27 M.L.J. 169
2. (1935) M.W.N. 367

Cr. M. P. No. 1906 of 1948
November 26, 1948

RAJAGOPALAN, J.

A. B. TONSE & others
v.
THE KING

Penal Code (XLV of 1860*) s.* 4 (1) *& Cr. P. C. (V of* 1898*), s.* 188*—As adapted by Indian Independence Adaptation of Central Acts & Ordinances Order* 1948*—Offence in Acceding State—Trial in Province.*

On the date of the offences complained of (April or May 1946*) the accused were native Indian subjects of his Majesty within s.* 4 (1) *I. P. C. as it stood on that date. The offences were alleged to have been committed in Travancore and Cochin States. Sanction of the Provincial Government under s.* 188 *Cr. P. C. was given on* 25—5—1948. *Between the dates of the offences and the initiation of proceedings, the Indian Independence Act was passed and Travancore and Cochin acceded to the Indian Dominion.*

Held, *the criminal court in the Province of Madras had jurisdiction to try the accused for the offences.*

S. 4 (1) *I. P. C. cannot be deemed to be law prevailing in an acceding State and hence the Adaptation by the Order of* 1948 *is not* ultra vires *the Governor General.*

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the charges framed against the petitioners herein, the accused in C. C. No. 4 of 1948 on the file of the Court of the Special First Class Magistrate of Kanhanadi, Mangalore.

M. K. Nambiar & M. Sekhara Menon, for Petrs.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER.

The three charges against the petitioners were (1) that in the month of April or May 1946 they cheated Albert Correa, P. W. 10, at Varapurzha in Travancore State, (2) that about the month of March 1946 they cheated P. W. 11, V. Hormis, at Cheranallur in Cohin State, and (3) that in about February 1946, again at Cheranallur in Cochin, they cheated P. W. 12, M. C. Simon, and that they committed offences punishable under S. 420 read with S. 37 I. P. C. The petitioners have applied to have these charges quashed.

On the date of the offences complained of the accused were "native Indian subjects" of His Majesty within the meaning of sec. 4, cl. 1 I. P. C. as it stood on that date. The offences were alleged to have been committed in Travancore and Cochin which were beyond "British India" within the meaning of S. 4 (1) I. P. C. Sec. 188 of the Cr. P. C. prescribed the sanction of the political agent or of a local Government before criminal proceedings could be validly initiated for offences committed by such persons outside British India. That sanction was given by the Government of Madras on 25—5—1948. There was thus a valid initiation of criminal proceedings against these petitioners only on 25—5—1948.

Between the dates on which the offences were alleged to have been committed and the initiation of criminal proceedings against the petitioners the Indian Independence Act was passed. Subsequent to that Travancore and Cochin, which had been beyond British India before the Indian Independence Act, acceded to the Dominion of India.

The question for consideration in this petition is whether the criminal court in South Kanara in the Dominion of India has jurisdiction to try the petitioners for the offences they were alleged to have committed in Travancore and Cochin.

Had there been a valid initiation of the criminal proceedings before 15—8—1947, on which date the Indian Independence Act came into force, the case for the Crown would have been unanswerable. Were the dates on which the offences were alleged to have been committed and the date on which criminal proceedings against them were validly initiated subsequent to 15—8—1947 and the date of accession of Travancore and Cochin to the Dominion of India, the case for the Crown would have been equally unanswerable.

S. 4 (1) of the I. P. C. as amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 ran:

"The provisions of this Code apply also to any offence committed by (1) Any British subject of Indian domicile in any place without and beyond the Province of India."

No doubt, as the learned advocate for the petitioners pointed out, on 25-5-1948 Cochin and Travancore were part of the Dominion

of India. A reference to S. 2, cl. 4 of the Indian Independence Act and S. 5 (1) (c) of the Government of India Act, 1933 as adapted by the Indian Provisional Constitution Order of 1947 should make that quite clear. There is really no need at this stage to consider the scope of S. 7 of the Indian Independence Act. As I have already pointed out, before 25—5—1948 Cochin and Travancore had acceded to the Dominion of India.

The learned Advocate for the petitioners contended that S. 4 (1) I. P. C. was extra-territorial in its operation and could not, therefore by itself confer jurisdiction on criminal courts in the Dominion of India to try persons for offences committed in India. As ancilliary to this contention the learned advocate urged that the amendment of S. 4 (1) of the I. P. C. by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, was *ultra vires* the Governor-General and that such a change in law would also be *ultra vires*, the legislature of the Dominion of India. No doubt, S. 6 (2) of the Government of India Act limits the powers of the Legislature of the Dominion of India to enact laws to be in operation in the acceding States. It was not denied that Criminal Law and Criminal Procedure were not included within the scope of the Instrument of Accession signed by the Rulers of Travancore and Cochin.

S. 4 (1) I. P. C. as amended provides a complete answer to the contentions of the learned advocate for the petitioners. To reiterate, S. 4 (1) ran

> "The provisions of this Code (I. P. C.) apply also to any offence committed by any British Subject of Indian Domicile in any place without and beyond the Provinces of India".

That the petitioners are British subjects of Indian domicile was not questioned. That Travancore and Cochin are beyond the Provinces of India as the expression "Province" has been defined and used in the Government of India Act is not open to question. S. 5 of the Government of India Act itself differentitates between the Governors' Provinces and the Indian States acceding to the Dominion. What s. 4 (1) I. P. C. provides for is the punishment of British subjects of Indian domicile resident in a Province—whether it is a Governor's province or a Chief Commissioner's Province, it is immaterial–for offences committed outside the Provinces. The acceding States are certainly outside the Provinces within the meaning of s. 4 (1) I. P. C., and that they are outside the Province is established by s. 5 of the Government of India Act, though those States have become part of the Dominion of India.

To reiterate the learned advocate for the petitioners urged that s. 4 (1) I. P. C. was extra-territorial in its operation. To that extent that contention is quite correct. But what s. 4 (1) I. P. C. really provides for is its operation ex-the territory of the province, in this case ex-the territory of the Province of Madras. That the legislature of the Dominion of India is competent to legislate for such a class of offences cannot be really open to question. It should be remembered that the persons to whom s. 4 (1) is intended to apply are British subjects of Indian domicile; and the petitioners are British subjects of Indian domicile. They are British subjects residents of a province, for whom the legislature of the Dominion of India can legislate. I am unable to see any real basis in law for the contention of the learned advocate for the petitioners, that because such persons are to be punished for acts done by them in an acceding State, S. 4 (1) I. P. C. should be deemed to be the law prevailing in the acceding States. It is not as if s. 4 (1) I. P. C. was intended to confer jurisdiction on a criminal court in one of the acceding States to try British subjects of Indian domicile for offences committed by them in such an acceding State.

The real question for consideration in this petition is whether s. 4 (1) I. P. C. would apply when the offence was alleged to have been committed on a date when Cochin and Travancore were not part of British India and when the intimation of criminal proceedings against the petitioners for those acts was on a date when Cochin and Travancore had become part of the Dominion of India.

What constituted the offence complained of should obviously be governed by the law as it stood on the dates the offences were alleged to have been committed. Under s. 4 (1) I. P. C. as it stood on the dates the offences were alleged to have been committed such offences committed in Cochin and Travancore were punishable under s. 4 (1) I.P.C. provided the requirements of s. 188 Cr. P. C. were satisfied. As has been pointed out in *Antony D' Silva* [1] the first part of s. 188 is really the counter-part of s. 4 (1) I. P. C. s. 188 Cr.P.C., being procedural, had to be applied as it stood on 25–5–1948 : and s. 188 Cr. P. C. was amended by the Indian Independence (Adaptation of Central Acts and Ordin-

1. [1948] M.W.N. 524 : Cr. 120

ances) Order, 1948 to conform to S. 4 I. P. C. as it was amended by the same order. On 25—5—1948, the Government of Madras could and did sanction the initiation of criminal proceedings against the petitioners for offences alleged to have been committed by them outside the province of Madras. S. 4 (1) I. P. C. and S. 188 Cr. P. C. cannot be viewed as wholly extra-territorial in its operation. It is not extra territorial in the sense that that would be the law applicable to the Courts in Cochin and Travancore; but in a restricted sense the operation of S. 4 (1) I.P.C. and S. 188 Cr. P. C. is extra-territorial, in that it provides for punishment of offences committed by the British subject of Indian domicile resident in a Province for offences committed by him outside that province. It is not the marginal note to S. 4 (1) that really governs the scope of the operation of that section but the plain wording of the section itself.

To sum up, the contention of the learned Advocate for the petitioners, that there is no provision in the Indian Penal Code to punish any person, though he be a subject of the Dominion of India resident in a province, for offences committed in Travancore and Cochin, which were outside British India when the offences were alleged to have been committed, after such States had become a part of the Dominion of India, must fail. Such offences, in my opinion, are punishable under S. 4 (1) I. P. C. as it stood on the date of the offences were alleged to have been committed, provided the requirements of S. 188 Cr. P. C. were satisfied. They were satisfied on 25—5—1948, and there was a valid initiation of proceedings. The petition is dismissed.

Mr. Nambiar for the petitioner asked for a certificate to issue for leave to appeal to the Federal Court under S. 205 (1) of the Government of India Act, 1935. It is no doubt true that an interpretation of the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, amending the provisions of S. 4 I.P.C. and S. 188 of the Code of Criminal Procedure and their validity in the acceding States was involved in the case before me. But as pointed out by the learned Public Prosecutor *Kuppuswami* v. *King* [2] bars the grant of a certificate at this stage. There has been no final adjudication of the rights of the parties, that is, of the liability in criminal law of the petitioners. No doubt an important point of jurisdiction has been decided. That by itself is not enough to justify the grant of the certificate contemplated by s. 205 (1) of the Government of India Act, 1935. It would still be open to the petitioners to ask for such leave should there be a final determination of their liability, for example, by a conviction in the ultimate Court. At present there can be no issue of the certificate prayed for.

N.T.R. —

2. [1940] M.W.N. 193: Cr. 41 F.C.

Cr. M. P. Nos. 1416, 1418, 1420, 1502, 1504, 1506, 1557, 1559, 1560, 1561, 1565, 1566 & 1567 of 1948

October 1, 1948

GOVINDA MENON, J.

G. NATESAN & others
v.
THE KING

Companies Act (VII of 1913), ss. 132, 145 & 282—Ingredients—Liability of auditor and directors.

To make out an offence against the auditor and the directors of a company under s. 282 Companies Act for publishing a false balance sheet it must be shown that the statements in the balance sheets are in some respect false and false to their knowledge.

The auditor's business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that. His duty is to examine the books of the company, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company.

Failure to show in the balance sheet what exactly would be the accrued interest in any year does not amount to wilful concealment of a material fact, where there is a note that the accrued interest has not been taken into consideration and this was well known to the shareholders and the public.

Loans taken by the directors in a year, if the same had been paid off during the course of the same year, need not be specifically and separately mentioned in the balance sheet.

Directors are entitled to depend upon and trust the permanent officials and the managing director of the company, so far as the working of the company is concerned.

Where the prosecution has not been able to show any malafides or want of good faith on their part, they cannot be held guilty under s. 282 Companies Act.

Petitions praying that in the circumstances stated in the Memorandum of Grounds filed

therewith, the High Court will be pleased to quash the charges framed against the petitioners herein in C. C. Nos. 91, 92 and 93 of 1946 on the file of the Court of the Sub-Divisional Magistrate, Kumbakonam.

V. Rajagopalachari, K. V. Ramachandra Ayyar, K. S. Champakesa Ayyangar, K. S. Desikan & N. Rajagopala Ayyangar, for Petrs.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER

These groups of applications arise out of three calendar cases Nos. 91, 92 and 93 of 1946 on the file of the Sub Divisional Magistrate, Kumbakonam. In C. C. No. 91 of 1946 there are nine accused, of whom eight were the directors of a banking company known by the name of the Sankara Ramanuja Sidantha Paripalana Nidhi, Limited, Kumbakonam and they are being prosecuted for an offence under s. 282 of the Indian Companies Act for having wilfully made certain statements false in material particulars knowing the same to be false in the balance sheet of the company for the year ended 31-12-1938. The remaining accused was an auditor of the said company. In C.C. No. 92 of 1946 there are seven accused of whom six were directors and one the auditor and they are prosecuted for a similar offence under s. 282 of the Indian Companies Act in connection with the balance sheet for the year ended 31—12—1939. In C.C. No. 93 of 1946, again there are nine accused persons of whom eight were the directors and one the auditor and the offence enquired into against them is one under s. 282 of the Indian Companies Act relating to the balance sheet for the year which ended with 31-12-1940. Cr. M. P. Nos. 1416, 1418 and 1420 of 1948 have been filed by the auditor-accused in the three calendar cases to quash the charge framed against him in each of them. Cr. M. P. Nos. 1502, 1504 and 1506 of 1948 are by the 2nd accused in all the three calendar cases for quashing the charge framed against him under the same s. 282 of the Indian Companies Act.

Cr. M. P. Nos. 1565, 1566 and 1567 of 1948 are the three petitions filed by the 3rd accused in all the three calendar cases for quashing the charge framed against him under s. 282 of the Indian Companies Act for a similar offence. Cr. M. P. No. 1557 of 1948 is by the 4th and 7th accused respectively in C. C. No. 91 of 1946 for quashing the charge framed against them for the offence under the provisions of s. 282 of the Indian Companies Act. Cr. M. P. No. 1559 of 1948 is by the 4th accused in C. C. No. 93 of 1946 for quashing a similar charge and Cr. M. P. Nos. 1560 and 1564 of 1948 are by the same individual who was the 5th and 6th accused respectively in C. C. Nos. 92 and 93 of 1946 for quashing similar charges framed against him.

As all these petitions are connected and intertwined with each other and they arise out of similar transactions it will be more profitable and convenient to deal with all of them by the same order. In fact the learned counsel appearing in these various cases have agreed on the main outlines of their arguments and the leading argument was by Mr. V. Rajagopalachari on behalf of the auditor-accused in the miscellaneous petitions. The other learned counsel while adopting in all essential aspects the arguments of Mr.V. Rajagopalachari have placed before the Court certain further arguments relating to each of the director-petitioners seperately. It will be, therefore, useful to give a brief resume of the genesis of the transactions which culminated in the proceedings against the Nidhi concerned of which the various accused were the directors and the auditor.

The Sankara Ramanuja Sidhantha Paripalana Nidhi, Limited, Kumbakonam was a limited liability company doing banking business and incorporated under the Indian Companies Act. During the relevant dates the various accused persons were respectively the directors of the Company. In April 1941 the business of the company was suspended and on 9—1—1942 as a result of the order passed by this Court in O. P. No. 202 of 1941 it was ordered to be compulsorily wound up. In the meanwhile on 5—10—1941 an interim auditor had been appointed to scrutinise the accounts of the company and he has submitted his report, Exhibit P-13 on 5-11-1941. After the winding up of the company and the Official Receiver taking charge of its business, a misfeasance summons under S. 235 of the Indian Companies Act by application No. 2337 of 1944 had been taken out and P. W. 2 in the lower court was appointed auditor to scrutinise the accounts, the balance sheets and the various other documents relating to the working of the company and submit a report regarding the way in which the affairs of the company had been going on. Exhibit P-13 is the report dated 14-3-1945 submitted by P. W. 2 and thereafter the matter was referred to the Registrar of Joint Stock Companies for taking action under the appropriate provisions of the Indian Companies Act. The Registrar of the Joint Stock Companies after

taking the necessary legal opinion filed the three complaints out of which the three calendar cases arose, under S. 237 for offences under S. 282 of the Indian Companies Act. After examining the witnesses tendered for the prosecution in all the three cases which were tried togther the learned Sub-Divisonal Magistrate has framed the charges which are now sought to be quashed on the ground that the evidence let in does not disclose that any offence has been committed at all.

It is unnecessary to set out in any detail what ought to be the contents of a balance-sheet for that matter is statutorily found in S. 132 of the Indian Companies Act. The duties of an auditor with respect to the scrutiny of the accounts, etc. of the company are also defined in S. 145 of the Companies Act. According to the prosecution, the auditor in these cases in signing the various balance sheets wilfully made false statements in material particulars knowing the same to be false and the same is the gravamen of the complaint against the directors also. It becomes, therefore, necessary to consider whether there were false statements, of material particulars wilfully made by the accused knowing them to be false. If all or any of these ingredients do not exist the accused cannot be held guilty of an offence under S. 282 of the Indian Companies Act. The arguments of the learned counsel ranged over a wide field regarding the duties and powers of an auditor and the responsibilities of an ordinary director in a banking company for demonstrating that there is no title of evidence regarding any of the ingredients necessary for an offence under S. 282 of the Indian Companies Act. The counsel for the petitioners invited my attention to the evidence especially of P. Ws. 1 and 2. The other witnesses examined, namely, P. Ws. 3 to 5 are merely formal proving the various documents filed in the lower court. The charges framed deal with three different matters each of which according to the prosecution makes the accused persons guilty of the offence under S. 282.

The first of them is that there are defects and omissions in the classification of loans and securities and their verification. This is explained by elaborating that in the balance-sheets of the three years, loans which according to the auditor were unsecured had not been specifically mentioned as such. Secondly, in these balance sheets the debts have not been separately demarcated as good, bad or unrealisable. Thirdly, the balance sheets did not disclose what were the amounts, borrowed by the directors from the company or advanced to the directors during the course of the respective years and lastly, it is stated that the accrued but unrealised interest on the various loans has not been disclosed as an asset. The contention of the Public Prosecutor is that these matters have to be specifically and clearly shown in the balance-sheet and the failure to do so would make the petitioners guilty of the offence complained against.

I shall deal with each of these heads separately and in seriatim. Exhibit P-2 is the report of the auditor, P-2 and the evidence of the witness is based entirely upon this document. In schedule 33 at page 154 of Exhibit P-2 it is stated on 7-4-1941 a sum of Rs. 28,737 out of the loans advanced in the year 1938 on the security of the produce of grains was outstanding without being guaranteed by any existing security. Similarly on the same date a sum of Rs. 11, 454 is seen as outstanding out of the loans on the produce advanced in the year 1939. Likewise a sum of Rs. 36,959 was seen outstanding on 7-4-1941 out of the produce loans granted in the year 1940. P.W.2 states that so far as produce loans were concerned he verified all the loans which were in the town and to which he was taken and he treated them as existing assets. He treated as unsecured loans such of them about which there is no evidence that the Nidhi had any control over the produce which formed the primary security. He came to this conclusion as he did not have any evidence that there was any such security and on asking for the records they were not forthcoming. Since there was nothing to show that the original stock was ever replaced, he came to the conclusion that these outstanding loans were unsecured ones on 7-4-1941. Again he states, that with regard to the produce loans, he examined the promissory notes, pledge chits and appraising forms and found them satisfactory so far as the documents were concerned. He inspected the physical stocks in the bank, but he did not contact any person who had taken loans on security of stocks outside the town and did not verify those stocks as he was told by the clerk Krishnamachari that there was no necessity to do so but he did not take a statement from the clerk. P.W.2 also stated that he cannot say that the stock or produce was not in existence on the dates of the balance sheets in question and the reports of the auditors on those balance sheets are not correct.

In view of this state of evidence, it is impossible to say that the produce loans outstanding are unsecured. P.W.2 admits that he did not inspect the various places where produce was stored or stocked to satisfy himself about their existence or not. Unless it is shown by the prosecution that the produce as such did not exist and that the loans were falsely entered as secured, a criminal Court will not be justified in framing a charge on this evidence. In fact after the admission by P.W.2 that he could not say that the stock or produce was not in existence on the dates of the balance sheets in question or that the report of the auditor on those balance sheets was not correct the lower Court had no jurisdiction to frame a charge that the produce loans were unsecured. It is not shown that on the date of the balancesheets, the produce did not exist as I have stated already. It was the duty of P.W.2 before he submitted his report containing the allegation that the produce loans were unsecured, to have examined atleast one or two of such borrowers and ascertain whether on the date of his investigation the security of the produce did or did not exist. The learned Public Prosecutor invites my attention to paragraph 20 of the report Ext. P-2 wherein it is stated by P.W.2 that in the case of produce loans there is no positive evidence that there was a pledge in the real sense of the word, the Nidhi having full possession of the produce. It is also stated that there is no evidence that there was any inspection as to the continued existence of the produce in good condition and the auditor simply came to the conclusion that because paddy stocked in one and the same place without any movement or other interference for more than a year and a half would not be in good condition, it is necessary to infer that there was no pledge in most of the cases and that the Nidhi probably had a floating charge on the produce, if such produce existed at the time of the advance of the loan. Even if it were a floating charge it was obligatory upon the auditor to have ascertained whether in the godown at the time of his report there existed sufficient quantity of produce to cover the amounts lent by the company to any particular individual. Not having made any attempt to ascertain the existence or otherwise of such produce it is not open to the auditor to say that there was no pledge in the real sense of the term and as I have already remarked, in view of the definite admission made by P.W.2, that he cannot say whether the stock or produce was in existence or not, he is not justified in saying so. This item of charge ought not to have been framed by the lower court. The auditor was dealing with a set of circumstances in April 1941 and according to him he makes a report about what should have been done in 1938, 1939 and 1940. In the absence of any verification by the auditor, the charge as regards the unsecured nature of loans being false in the various balance sheets cannot be sustained. It has not been shown that the statements in the balance sheets are in any respect false, and much less false to the knowledge of the auditor and the directors.

Before discussing the legality and validity of the other charges framed against the petitioners it is necessary to advert without much elaboration to the powers and duties of an auditor of a company as well as the directors of such an institution. S. 145 of the Indian Companies Act, as referred to already, is a statutory enactment defining the powers of an auditor. This provision is to a large extent based upon the observations and dicta contained in the well-known decisions of the English Courts. In *In re London & General Bank* (*No.* 2) [1] Lindley L.J. observes as follows :

> "It is no part of an auditor's duty to give advice, either to director's duty or share holders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, 'How is he to ascertain that position?' The answer, is 'By examining the books of the company.' But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be kept as to show the true position of a company, the auditor has to frame a balance sheet showing that position according to the books

1. [1895] 2 ch. 672 (682)

and to certify that the balance sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company."

This case has been considered in *Re Kingston Cotton Mill Co* (*No* 2) [2] and Lindley L. J. in the court of appeal affirms and reiterates what was laid down in the earlier case and observes as follows:

"I now come to the real question in this controversy, and that is, whether the appellants have been guilty of any breach of duty to the company. To decide this question it is necessary to consider (1) what their duty was; (2) how they performed it, and in what respects (if any) they failed to perform it. The duty of an auditor generally was very carefully considered by this court in *In Re London and General Bank* [1] and I cannot usefully add anything to what will be found there. It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance-sheet showing the true financial position of the company at the time to which the balance-sheet refers. But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill. It was further pointed out that in any particular case a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error.

The company's articles of association contain special regulations relating to auditors; See Arts. 129–140; but they do not impose upon the auditors any more onerous duties than those I have already mentioned."

The learned Lord Justices in the court of appeal accepted the arguments of Mr. Haldane, as he then was, that a mere error of judgment on the part of an auditor is not enough. Lopes L. J. also considers this question in the same strain as Lindley L. J. and observes at page 288 in *In re Kingston Cotton Mill Co.* (*No.* 2)[2].

"They are very fully described in *In re London and General Bank* [2] to which judgment I was a party. Shortly they may be stated thus :—It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful."

Both these cases were again considered in very great detail in *City Equitable Fire Insrance Co., in Re* [3]. At page 483 Romer, J., as he then was, refers in detail to the observations of Lindley L. J. that an auditor has nothing to do with the prudence or imprudence of making loans with or without security. He must, of course, take care that he does not bring into his balance-sheet at face value a debt that is not a good one. At page 509 Pollock M. R. in confirming the judgment of Romer, J., in the Court of Appeal refers to and accepts the dictum contained in *In re Kingston Cotton Mill Co.* [2] and further observes that in the words of Sargant L. J. the duty of an auditor is verification and not detection. The learned Master of the Rolls discussed the matter in great detail and came to the conclusion as was done by the Court of Appeal 30 years prior to that date. These principles are so well established in English Courts and have been consistently followed in our Courts that there can be no dispute regarding them. Applying these principles to the facts of the present case, on the evidence of P. W. 2, I am not able to find that the auditor accused in this case has in any way failed to act according

2, [1896] 2 ch. 279 (284)

3. [1925] 1. ch. 407

to the strict confines of the duty imposed upon him. On the other hand, even according to the evidence of P. W. 2, the auditor has done what is expected of him.

The next question is whether the balance-sheets in question have disclosed the nature of the bad and doubtful debts of the company. According to the articles and memorandum of association as well as the evidence before the lower Court the Sankara Ramanuja Siddanatha Paripalana Nidhi is a banking company in accordance with the provisions of s. 277 (1) of the Indian Companies Act. P. W. 1 in his cross-examination admits that the Nidhi is doing banking business. Form 'F' which shows the necessary and essential requisites of the balance-sheet of a banking company has been amended by Act XXX of 1943 as a result of the observations in some of the decisions of the Bombay High Court.

Before the amendment there was a notification dated 16–1–1937 by the Government of India in the same terms as is now contained in Act No. XXX of 1943 directing alteration in the Form 'F' schedule III. That being the case and since it is admitted that this is a banking company in the balance-sheet of which it is not necessary to show such debts I do not think that there was any wilful omission in the balance sheet so far as this item is concerned.

The next point for consideration is whether it is obligatory to show in the balance sheet what exactly would be the accrued interest in a particular year. Schedule 14 of Exhibit P-2 at page 81 contains according to P. W. 2. the amount of accrued interest for the years 1933 to 1940. It is found therefrom that the balance-sheets of the concerned years, namely, 1938 to 1940 do not show that any interest accrued was taken credit of for determining the dividends payable to the shareholders. In this connection it is necessary to consider the admissions made by P. W. 2 in his cross-examination. He says "Accrued interest on book debts need not be shown separately and practice varies. Till the end of 1935 the Nidhi took credit for all interest accrued on debts. Then they made a change of policy and wanted to adopt the goal of cash basis for interest receipts. This basis is sound for the distribution of profit." Later on, he further admits that the shareholders were informed that the accrued interest on certain loans were not to be taken credit for unless actually credited, and this statement is reiterated in every balance-sheet till 31–12–1939. Again this admission goes on to state that it is well known to the share holders and the public that all accrued interest were not taken to the balance-sheet though P. W. 2 states that in his opinion it is not a sound policy. He has necessarily to admit that he could not attack the bona fides of this policy. Further, two of the balance-sheets in question have a note appended; that accrued interest has not been taken into consideration. In this state of circumstances, it is very difficult to see how any Court can say that either the directors or the auditor have in any way wilfully concealed any material fact about accrued interest from the balance-sheet. In *Newton* v. *Birmingham Small Arms Co. Ltd.* [4] Buckley, J. while discussing a similar matter observed as follows :—

> "If the balance sheet be so worded as to show that there is an undisclosed asset, whose existence makes the financial position better than that shown, such a balance-sheet will not in my judgment, be necessarily inconsistent with the Act of parliament. Assets are often by reason of prudence estimated, and stated to be estimated at less than their probable real value. The purpose of the balance sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance sheet is not, I think, necessarily fatal to these special resolutions."

Later on the learned judge observes that if the auditor reports to share-holders that in the balance-sheet there was such a reserve fund, that would be sufficient. In this case, the note appended showing that the accrued interest has not been taken into consideration in fixing the dividend, is sufficient to bring home to the share-holders the existence of such an asset. I am decidedly of opinion that this item of charge has necessarily no basis whatever.

It has then to be considered whether the fact that the loans taken by the directors in any particular year, if the same had been paid off during the course of the same year should be specifically and separately mentioned in the balance sheet. It is not disputed that there is a statement in the balance sheet regarding loans taken by the directors in a given year outstanding at the end of each year; and it is admitted, that whatever was outstanding at the end of the year by way of loans to the directors has been mentioned in each year's

4. [1906] 2 ch. 387

balance-sheet. P. W. 2, again admits in cross examination "I do not think the balance-sheet is falsified by the non mention in the balance sheet of the volume of loans issued to the directors at any time during the year. I do not think the omission is due to *mala fides* but it was due to ignorance". In addition he agrees "that the balance-sheet is not a history of individual transactions closed during the year, except those of the directors whose history must be mentioned in the balance-sheet even if the transaction is closed. Loans to directors ought not to be entered in the left hand column and it is not brought into the total and its non-mention will not affect the correctness of the balance sheet". My attention has not been drawn by the learned Public Prosecutor to any provision of law or any observation in a decision to the effect, that the loans taken by a director in a particular year, which were repaid by him before the end of the year, should be mentioned as a separate item in the balance-sheet even though the business had been closed. It is no doubt necessary in order that the balance sheet may be a true and correct one, that all the necessary information regarding the financial status of the company and its working has to be given to the share-holders and that the balance-sheet should contain how much money was outstanding as being loans to the directors at the end of a particular year; but in my opinion it is unnecessary to show the volume of business transacted with a director or directors, if the loans have been duly repaid within the course of the year. It is just possible, that a director or directors may be doing individually and separately business on a very large scale, and during the course of such business, large amounts may have to be borrowed from a bank, of which he or they happen to be a director; but if the loans are properly paid off during the course of the year and they are not outstanding when the year ends, it is unnecessary to encumber the balance-sheet by showing details of all closed-up transactions that had taken place during the intervening period. Such being the case it is not possible to say that any criminal offence has been committed by the directors or the auditor in not mentioning the details of the loans given to the directors.

In discussing the general liability of the directors for the so-called false statements referred to in the charge, it is necessary to consider what exactly the legal position of the directors is, vis a-vis the company with regard to the criminal liability for their actions. In a recent case reported in *Pullin Chandra Daw* v. *Emperor* [5] Chakravarthi, J. referred to the decision of the Privy Council reported in *Srinivas Mall* v. *Emperor* [6] where their Lordships quoted with approval the proposition laid down in an earlier case that

> "Unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

The learned Judge after quoting this passage observes as follows:

> "Be that as it may, it appears to us that the language used by S. 282 itself does import an element of *mens rea* when it speaks of the relevant statement being known to be false."

The decision in *Re. City Equitable Fire Insurance Co.* [3] discusses the meaning of the term "willful" in relation to the actions of the directors of a company. In *Doss* v. *Connell* [7] in considering whether in the circumstances of a particular case the directors were guilty of wilful negligence Leach, C. J. and Varadachariar J. have followed the dictum of Romer J. in *Re City Equitable Fire Insurance Co.* [3] regarding the duties of directors and as to what amounts to wilful negligence. In adverting to the question whether a director is justified in trusting the officials of the company, this Court referred to the observations of Lindley M.R. in *Re National Bank of Wales, Ltd.* [8] in the following terms:

> "Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as those below them, until there is reason to distrust them. We agree the care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him appears to us to be laying too heavy a burden on honest business men."

They have also relied upon the observations of Lord Davey in *Dovey* v. *Corly* [9].

> "I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters

5. [1948] A.I.R. Cal. 190
6. [1947] M.W.N. 589: Cr. 125: 51 cal 900 P.C.
7. [1937] M.W.N. 1099: I.L.R. 1938 Mad. 292
8. [1892] 2 Ch. 629 (673)
9. [1901] A.C. 477 (492)

which were brought before the board at the meetings of which he attended and it is not proved that he did not do so."

It seems to me that these *dicta* are applicable to the actions of the petitioners herein. The accused in this case are men of position and responsibility and some of them are, I am given to understand, members of the Bar enjoying fairly good practice. One cannot attribute any wilful negligence or dishonesty to men in such positions if they depend upon and trust the permanent officials and the managing director of the company so far as the working of the company is concerned. The prosecution has not been able to show any *mala fides* or want of good faith on the part of any of these accused. All that might be laid at their door is perhaps the blame–if that could be called a blame at all–that they placed trust upon the permanent servants of the company. It seems to me that they are not guilty of any false statement of any material particular wilfully made and knowing the same to be false. Even accepting as fully correct and true, the oral and documentary evidence placed before the lower court, I do not think there are any materials, whatever, on which the charges can be framed under S. 282 of the Indian Companies Act. This is a case of entire absence of evidence and the learned Sub Divisional Magistrate was not justified in framing charges on the materials placed before him.

I would, therefore, quash all the charges and discharge the accused in the various petitions.

N.T.R. —

R. T. No. 105 of 1948
Cr. App. No. 594 of 1948

November 13, 1948

HORWILL & GOVINDA MENON, JJ.

THE KING

v.

MUTHIAH THEVAN

Criminal trial—Medical witnesses—When to be examined.

Medical witnesses who speak to the post-mortem examination should be examined after the eye witnesses' testimony has been recorded. The trial Judge would then have an overall idea of the entire prosecuction case and he would be in a better position to put proper questions to the doctor to elucidate fully the nature of the injuries; otherwise great inconvenience and difficulties will be experienced especially by a court of appeal.

Trial referred by the court of Session of the Madura Division for confirmation of the sentence of death passed upon the said prisoner (2nd accused) in C. C. No. 128 of 1948 on 9th October 1948; and appeal by the prisoners against the sentences passed on each of the accused by the court of Session of the Madura Division on 7—10—1948 in the said S. C. No. 128 of 1948.

V. T. Rangaswami Ayyangar, for Accused.
Public Prosecutar (V. L. Ethiraj) for Crown.

JUDGMENT.

[GOVINDA MENON, J.]

This case, again illustrates, the inconvenience and difficulties experienced especially by a court of appeal when the doctor who speaks to the post mortem examination of the body is examined as the very first witness for the prosecution. We feel that if the doctor had been examined after the eye-witnesses' testimony had been recorded, the learned Sessions Judge would have been in a much better position to have an overall idea of the entire prosecution case so that he would have been in a better situation to put proper questions to the doctor to elucidate fully the nature of the injuries.

The appellants were accused 2 and 3 respectively in the court below. The 1st appellant has been sentenced to death for the murder of Veeranna by cutting him at about 6 a. m. on the 29th March 1948. The second appellant was also charged along with the first for the same offence; but the learned Ssssions Judge found him not guilty of having any common intention with the first appellant to commit the murder, and therefore he was convicted only of an offence under S. 324 I. P. C. and sentenced to rigorous imprisonment for two years.

The prosecution case is very simple. P. W. 4 according to his testimony, had gone a few days prior to the date of murder to the house of the 2nd accused for the purpose of borrowing a vel stick for boar hunting. At that time the 2nd accused was not in the house, the time of the visit being night-time. The 2nd accused probably thought that P. W. 4 went there as he was friendly with the 2nd accused's wife. This is alleged to be the motive for attacking P. W. 4. Shortly stated, what happened on the day of occurrence was this. At about dawn P. W. 4 had gone to answer the calls of nature and was returning homewards, when the second accused met him and attempted to cut P. W. 4 with aruval which accused 2 was having with him. On seeing this P. W. 4 ran raising an alarm. The third

accused who had also been armed with a vel stick chased him and both of them ran after P. W. 4; but fortunately he outstripped them and hence could not be injured; but the father of P. W. 4 on hearing this noise and the cry of P. W. 4 came running and wanted to intercede. The second accused then, according to the prosecution case now, cut the deceased, the father of P. W. 4, on the right side of the neck. The third accused stabbed him on the left shoulder with a vel stick. P. W. 4 pelted a stone at the 3rd accused which felled him down. P. W. 5 came running from the north and tried to separate but the second accused could not be pacified at all. He again cut the deceased on the neck and on the head. Afterwards the accused ran away when the deceased fell down. The deceased was taken to the house of the Village Munsif, P. W. 9, at about 6–30 a. m., that is, nearly within half an hour of the occurrence, and a statement was recorded at the house of the village munsif which was written by a teacher, P. W. 8, Exhibit P. 4. In that statement the deceased stated that when he was returning home the second accused came from the Mandaiamman temple and cut him with a vettaruval on the neck. After he fell down, the second accused cut the deceased again twice on the left shoulder. The third accused stabbed the deceased above the left elbow with a spear and cut him on the head above the right eye with a spear. Therefore according to this statement of the deceased, which is a dying declaration, the injury on the head above the right eye was given with a spear by the third accused and the other serious injuries were given by the second accused. After this statement was recorded the deceased was sent to the hospital at Uthamapalayam where he was admitted as an in-patient. By the time he reached the hospital, the deceased was unconscious and so no further statement could be taken from him. In spite of the best medical aid that could be given the deceased died on the 15th of April, 1948. It is unnecessary to state at any length about the various other stages in the investigation, for though three persons were charge-sheeted the learned Sessions Judge acquitted the first accused before him.

According to the post mortem certificate, Exhibit P. 2, there were six injuries on the body of the deceased of which injuries 1, 2 and 5 were grievous and the doctor was of opinion that death was due to the injury on the brain which was a necessarily fatal one. He also testified that at the post mortem all the injuries excepting injury No. 1 were almost healed up. Though the doctor does not say that, from the general tenor of the evidence we are led to conclude that the healing up was only superficial because internally it is seen that the brain matter had become softened and putrid and there was pus on the right side of the brain. The spinous process of the third cervical vertebra was slightly broken. The cerebro-spinal fluid was turbid and bloodstained and contained pus. The post-mortem certificate also shows that as a result of the second injury a portion of the occipital bone had been sliced off. In spite of all these injuries the doctor was of opinion that death was due to the injury in the brain and that the rest of the injuries were grievous.

The question, then for decision, is whether if we are to accept the dying declaration of the deceased the second accused can be held guilty of murder. The doctor gave as his view that it is not unlikely that the man was conscious. The man was conscious and able to make a statement for some time after the receipt of the injuries and from the evidence of the Village Munsif, P. W. 9, we are satisfied that he was in a conscious and fit state of mind to give the dying declaration. Therefore the dying declaration cannot be brushed aside as being made by a person who was not in his proper senses. And if the dying declaration is read along with the evidence of the doctor, the result necessarily follows that none of the injuries caused by the second accused resulted in the death of the deceased. But P. Ws. 4 and 5 depose as if all the serious injuries were given by the second accused, and they attribute one stab to the third accused on the left shoulder with a vel stick. When we come to the evidence of P. Ws. 6 and 7 it is seen that no part is attributed in the infliction of these injuries to the third accused at all, because by the time he pointed the vel stick at the deceased, according to P. Ws. 6 and 7, P. W. 4 pelted the third accused with a stone and the third accused fell down as a result of the hit by the stone. In this state of conflicting evidence we find it difficult to hold that the injury which caused the death of the deceased was dealt by the second accused.

So far as the third accused is concerned, the learned Sessions Judge has held that he is guilty only of an offence under s. 324 I. P. C. as he had no common intention to commit the murder along with the second accused. We

are in agreement with the learned Judge that accused 3 did not entertain any common intention with accused 2 to commit murder. But there are no grounds to differ from the lower court that accused 3 caused hurt to the deceased with a dangerous weapon; for which he has been properly convicted under s. 324 I. P. C. His conviction and sentence are confirmed.

As regards the second accused we have already stated that the injuries caused by him were serious and grievous : but if we accept the evidence of the doctor it cannot be said that any of these injuries caused the death of the deceased. In these circumstances we can convict the second accused only of an offence under s. 307 I. P. C. He no doubt intended to murder the deceased, but we cannot be sure that death resulted out of the injuries inflicted by him. The conviction and sentence on the second accused for the offence under s. 302 are therefore set aside, and he is convicted of an offence under s. 307 I. P. C. As regards the sentence we are satisfied that the injuries were certainly very serious, and we therefore sentence him to transportation for life.

N.T.R. —

Cr. R. C. No. 766 of 1948
Cr. R. P. No. 722 of 1948
August 20, 1948

GOVINDA MENON J.

VENKATACHALAM CHETTY & another
v.
RAMASWAMI CHETTY & another

Cr. P. C. (V of 1898) s. 145—Transfer to magistrate without jurisdiction—Re-transfer —Validity.

The additional district magistrate transferred a proceeding under s. 145 Cr. P. C. to a first class magistrate, who had no territorial jurisdiction over some of the properties. The first class magistrate passed a preliminary order. When the partial absence of jurisdiction of the first class magistrate was noticed, respondent applied for withdrawal of the proceedings from the first class magistrate and this application was granted by the additional district magistrate, who also passed a preliminary order.

Held, *the withdrawal of the case by the additional district magistrate was legal; that the preliminary order by the additional district magistrate was a valid order to the extent of the properties over which the first class magistrate had no jurisdiction and over the other properties as an order confirming the valid order of the first class magistrate.*

Petition under Ss. 435 and 439 Cr. P. C. 1898 praying the High Court to revise the order of the Court of the Additional District Magistrate of Tiruchirappalli dated 21-7-1948 and made in M. C. No. 25 of 1948.

V. T. Rangaswami Ayyangar, for Petr.
V. Rajagopalachari & V. Seshadri, for Respts

ORDER.

The Inspector of Police, Law and Order, Tiruchirappalli Town, apprehending that a breach of the peace is likely to occur between the petitioners and counter-petitioners herein regarding the possession of certain lands and houses belonging to Chetty Chatram Charities applied to the Sub Divisional Magistrate, Tiruchirappalli under S. 145 Cr.P.C. for necessary enquiry and action ; whereupon the Sub Divisional Magistrate sent up the records to the District Magistrate, Tiruchirappalli, apparently because of the heavy file in the former's Court. The Additional District Magistrate, Tiruchirappalli transferred the case to the file of the Additional First Class Magistrate, Tiruchirappalli for enquiry and disposal. It so happened that the Additional First Class Magistrate had no territorial juridiction over some of the properties; but this was not noticed or apparently realised when a preliminary order was passed on 17-7-1948 under S. 145(1) Cr. P. C. Both the petitioners and the counter petitioners appeared before the Magistrate and were served with notice and copy of the preliminary order. The petitioners then took objection to the preliminary order on the ground that the Additional First Class Magistrate had no territorial jurisdiction over some of the properties and the matter was adjourned for arguments to 20—7—1948. Meanwhile the respondents applied to the Additional District Magistrate on 19-7-1948 praying for the withdrawal of the proceedings before the Additional First Class Magistrate to his own file and this application was granted without notice to the petitioners on 21-7-1948 by an order passed in the following terms: 'MC.33of1948 on the file of the Additional First Class Magistrate, Trichy is hereby withdrawn from that Court and taken on file in this Court. The Additional First Class Magistrate, Trichy, should send the records immediately to this Court'. After withdrawing the case to his file, the Additional District Magistrate also passed a preliminary order under S. 145(1) and granted time to the parties to file written statements. It is this order that Mr. V.T. Rangaswami Aiyangar on behalf of the petitioners-B Party-wants to revise on two grounds; firstly, the Additional District

Magistrate had no jurisdiction to withdraw the case from the file of the Additional First Class Magistrate thereby curing and condoning a defect in the jurisdiction of the Additional First Class Magistrate and secondly a second preliminary order is illegal and inoperative since the earlier preliminary order passed by the Additional First Class Magistrate had not been withdrawn or dissolved by the legal processes laid down in S. 145 Cr. P.C.

That the Additional First Class Magistrate had jurisdiction only over some of the properties and that Additional District Magistrate has territorial jurisdiction over the entire properties have been conceded by both the parties. Therefore, according to Mr. V. T. Rangaswami Aiyangar the preliminary order of the Additional First Class Magistrate is operative only as regards some portion of the properties and void as regards the rest. Relying upon the decisions in 52 Madras 241, 72 I. C. 351, 1939 (1) M.L.J. 899 and 1942 M. W. N. Crl. 187, it is contended that the Additional District Magistrate ought not to have withdrawn the case to his own file. These decisions, no doubt lay down the general proposition that proceedings instituted in a court which has no jurisdiction in respect of them cannot be regarded as legally instituted and a superior Court cannot transfer them to a Court having jurisdiction and thereby cure a defect. In 72 I.C. 351 it is further laid down that the High Court in its inherent powers of supervision can direct the Court not to proceed further. In 52 Madras 241 Reilly J. observed that the order of a District Magistrate transferring the proceedings to a Sub Divisional Magistrate who had no jurisdiction over the land concerned was wrong and therefore any order passed by a Sub Divisional Magistrate to whom such transfer was made was therefore without jurisdiction. Now applying the principle stated above, it is seen that the earlier order of the Additional District Magistrate sending the proceedings to the Additional First Class Magistrate who has territorial jurisdiction over *only* a portion of the properties is without jurisdiction and the preliminary order with regard to a portion of the properties is therefore illegal. I do not think that there is anything illegal or unjustifiable in the Additional District Magistrate rectifying a mistake. None of the decisions go to this extent that a power of transfer once exercised under S. 528 cannot be any further invoked for the purpose of correcting an inadvertent and unthought of mistake. If the attention of the Additional District Magistrate had been drawn even at the outset to the circumstance that the Additional First Class Magistrate has jurisdiction over a part of the properties only, then, the sending of the case to the Additional First Class Magistrate would not have taken place. The decisions cited above deal only with instances of total absence of jurisdiction and not with partial absence in the matter of territorial powers. I cannot therefore uphold the contention that the Additional District Magistrate should not have withdrawn the case to his own file. Regarding the second argument that there was a valid preliminary order with regard to a portion of the properties which has not been set aside in accordance with law, no authority has been brought to my notice holding that once a preliminary order has been passed, even though it is erroneous in some respects it cannot be amended or confirmed by subsequent legal proceedings. But it is unnecessary to decide that position now for the reason that the withdrawal of the case to the file of the Additional District Magistrate carried with it the earlier preliminary order with regard to some portion of the properties and hence the order of the Additional District Magistrate should be construed as affecting that portion of the properties over which the Additional First Class Magistrate had no power to pass a preliminary order.

At one stage of his argument Mr. V.T. Rangaswami Aiyangar seemed to suggest that the preliminary order of the Additional District Magistrate is likely to affect his cilent adversely because if it is shown that his client was in possession within 2 months of the Additional First Class Magistrate's order but beyond two months of the Additional District Magistrate's order there will be great prejudice caused to him. After all the difference in time between the 2 orders is only 4 days and even if the B party shows that it was in possession of the properties over which the Additional First Class Magistrate had power within 2 months of the date of that order, in the view which I am taking that order is partly valid the Magistrate will have to declare his possession of such properties. Such contingency can only arise if Mr. V.T. Rangaswami Aiyangar's client can show that he was dispossessed between 17-5-1948 and 21-5-1948 and not at any earlier date. I therefore hold that the preliminary order of the Additional District Magistrate is valid from 21-7-1948 to the extent of the properties over which Additional First Class Magistrate had no jurisdiction and is also valid from 17-7-1948 over those proper-

ties over which Additional First Class Magistrate had jurisdiction as the subsequent preliminary order of Additional District Magistrate recording the latter properties is only a confirmation of the earlier valid portion of the order of the Additional First Class Magistrate.

I see no reason to interfere with the order of the Additional District Magistrate dated 21-7-1948 and dismiss the criminal revision case.

N.T.R. — *Petition dismissed*

Cr. App. No. 473 of 1948
January 7, 1949

SUBBA RAO & PANCHAPAKESA AIYAR, JJ.

CHELLIAH alias Mariappa Kudumban
v.
THE KING

Borstal Schools Act (*Mad. Act V of* 1896) *s.* 8 *—Scope of.*

All adolescents with criminal tendencies will clearly be covered by s.8 Borstal Schools Act. It is inequitable to send adoloscents with records of thefts, cheatings and criminal tendencies of that type alone to the Borstal school and to send adolescents with different criminal tendencies to the ordinary jail with far greater hardship involved and lesser facilities for reformation and of settlement in life by teaching a useful occupation.

Appeal against the order of the Court of Session of the Ramnad Division at Madura in C. C. No. 51 of 1948 passed on 28-7-1948.

K. P. Raman Menon, for Applt.

Crown Prosecutor, (S. Govind Swaminathan) for Public Prosecutor, for Crown.

JUDGMENT

[PANCHAPAKESA AIYAR, J.]

The accused, a boy past 16, has been convicted under s. 302 of the I. P. C. by the Sessions Judge of Ramnad, and sentenced to transportation for life with the recommendation for action under s. 10-A of the Borstal Schools Act.

The facts are simple: The accused and the deceased, a neighbouring boy of 12, were friends, though, like boys of that age, they were also now and then quarrelling. On 26-3-1948 the accused called the deceased to go with him to collect some *babul* beans which he had taken on lease for a rupee. The two boys went together, the accused taking with him a *thoratti* stick (a stick with a small iron bill-hook at the end) for plucking the beans. They were seen together gaily chatting and laughing and proceeding towards the *babul* tree by P. W. 7, the accused's step-mother. That night, the deceased did not return home: so, his relatives went about enquiring for him. Finally, the accused was questioned. At first he said that the deceased had gone to a cinema, circus, etc. Later on, he said that the deceased had climbed up a palmyrah tree to gather palmyrah fruits and had fallen down and died. Still later, when questioned sternly by the assembled villagers, he confessed, in the presence of P. Ws. 4, 5, 9, 10 and 12 and others, that he and the deceased went together and gathered *babul* beans from the tree leased out by him, and that he divided the collected beans into three equal shares, and offered one share to the deceased, taking two for himself, one by virtue of his lease and one by virtue of his aiding in gathering the beans. The deceased, however, insisted that he should receive a full half share. The accused would not agree. Thereupon, the deceased, in a huff, scattered the beans, saying that he did not want any. Then the accused gave him a slap on the cheek for refusing the one-third offered to him. The deceased then threw a stone at the accused, and the accused hit him with the *thoratti* stick (M.O.I.) and the deceased died of that one blow. Being afraid of the consequences, the accused said that he threw the dead body of the deceased into an adjoining well. He showed the assembled villagers the corpse of the deceased in that well; that was the first time that any body knew that the deceased's corpse was in that well. The clothes of the accused were also seized, and they were found stained with human blood. The prosecution suggestion is that the blood was that of the deceased.

The learned counsel for the appellant urged that the offence had not been brought home to the accused and especially the fatal blow covered by injury No. 8 which, even according to the doctor (P.W.I) could have been caused by a fall. We too are of the opinion that though the quarrel is proved and the infliction of some of the injuries on the deceased, including the grievous injury on the jaw, is proved to have been caused by the accused, there is no satisfactory proof that the fatal injury (injury No. 8) on the deceased was dealt by the accused, and that it might very well be that the deceased ran away after receiving some injuries and fell down and sustained injury No. 8 and died. In these circumstances, we set aside the conviction of the accused under S. 302 of the I. P. C. and substitute for it a conviction under S. 325 of the Code.

It is clear to us, from the very facts proved in this case that the accused is an adolescent

offender with criminal tendencies. Considering the entire circumstances, we are of opinion that the proper order to pass in this case is to direct the accused under s. 8 of the Borstal Schools Act, to be detained in the Borstal School, Palamcottah for a period of five years from the date of the lower court's conviction. We are of opinion that the very fact that this young boy dealt such injuries to the deceased for such a petty reason and threw the dead body into the well, will show pronounced criminal tendencies and propensities in him. We also consider that it is somewhat inequitable to send adolescents with records of theft, cheatings and criminal tendencies of that type alone to the Borstal School, and to send adolescents with *different criminal tendencies* as here, to the ordinary jail, with the far greater hardships involved and the lesser facilities for reformation and of settlement in life by teaching a useful occupation. All adolescents with criminal tendencies will clearly be covered by s. 8 in our opinion. We have no hesitation in following the ruling in *The Public Prosecutor* v. *Nagappa Pujari* [1] in preference to the different views taken in some other rulings. The age of the appellant is declared to be just past 16 at the time of his conviction by the lower court.

N.T.R. —

R. T. No. 109 of 1948
January 10, 1949

SUBBA RAO & PANCHAPAKESA AYYAR, JJ.

MURUGA GOUNDAN
v.
THE KING

Criminal trial—Witnesses resiling in Sessions Court—Conviction on.

It is very unsafe to convict an accused only on the evidence of persons who gave one version at the magistrate's court and a totally different version before the sessions Court unless there is other reliable evidence in support of the prosecution.

Trial referred by the Court of Session of the Salem Division for confirmation of the sentence of death passed upon the said prisoner (Accused No. 1 in C.C. No. 92 of 1948 on 25th October 1948) and appeal by the appellant abovenamed against the said sentence passed upon him in the said case.

1. [1949] M.W.N. 14 : Cr. 6

Md. Hibbathullah, for Accused.

Crown Prosecutor for the Public Prosecutor for Crown.

JUDGMENT
[SUBBA RAO, J.]

The accused has been charged under S. 302 I.P.C. and has been sentenced to death.

The case of the prosecution is that the accused, along with two others (accused 2 and 3), who have been acquitted killed Unnamalai Ammal and removed the *saradu* that was worn by her. P.W.3 is the sister of the accused and P. W. 4 is the wife of the accused, They gave evidence before the Magistrate implicating the accused, but in the Sessions Court they gave a different version altogether. The two witnesses were treated as hostile, and the learned Sessions Judge marked their depositions in the magistrate Court's as substantive evidence under S. 288 Cr. P. C. Ex. P–4 is the deposition of P.W.3 in the committing magistrate's Court. She said that, four months ago, on a Monday, her younger brother, i.e. the accused came to her and took from her a *kaiaruval* saying that he wanted it for cutting *pandal* post. On Wednesday he returned it at lamp-lighting time. On Thursday, he came again and asked her to give the *kaiaruval*. In that connection he told her that he and accused 2 and 3 joined together and killed the deceased, and that therefore he wanted to conceal the *kaiaruval*. Pursuant to his directions she concealed it. Later on, the police came along with the accused and asked for the *kaiaruval*. She took it from the place where she had concealed it and gave it to the police. P.W.3 also gave a statement before the magistrate under S. 164 Cr.P.C. That statement was consistent with the evidence afforded by Ex. P-4 in all material particulars.

Ex. P-6 is the deposition of P.W.4. P.W. 4, as already said, is the wife of the accused. She deposed that on the night of Wednesday the accused came and gave a gold *saradu* to her and asked her to keep it in the roof of the house, and she did so. When she asked him as to how he got the saradu he asked her to keep quiet. On Sunday, the accused came to her along with the police and he removed the saradu from the roof and gave it to the police. She also made a statement under S. 164 Cr.P.C. before the magistrate, and the recitals in that statement are also consistent with the version given by her in the committing court,

When P.Ws.3 and 4 gave evidence in the Sessions Court they gave a completely different version and stated that they deposed in the committing magistrate Court and made statements under S. 164 as the police threatened and beat them to do so. In the circumstances the learned Sessions Judge rightly treated their evidence as substantive evidence under S. 288 Cr.P.C. It may be stated that there is no other evidence either direct or circumstantial except the discovery of the jewel, with which we shall deal later on.

We think it is very unsafe to convict an accused, only on the evidence of persons who gave one version at the magistrate's Court and a totally different version before the Sessions Court, unless there is other reliable evidence in support of the prosecution case. In *Harnam Singh* v. *Emperor* [1] the learned Judges accepted the aforesaid principle as the rule of practice, and they stated the rule in the following terms :

> "We do not feel, therefore, that on the evidence of this character where every one of the witnesses has been demonstrated at the trial to have contradicted the statements that he made before the committing magistrate, it would be safe to convict."

With great respect we agree with them.

The learned Crown Prosecutor contended that there was one important fact in this case which corroborated the evidence of P. Ws. 3 and 4. The deceased had a gold *saradu* on her when she died, and it was identified as the one that was in the house of the accused. The learned Sessions Judge was wrong in saying that there were stains of human blood on this jewel. On the other hand, the Chemical Examiner to the Government of India states in Ex. P-3 that the blood-stains on item 95, i.e. the gold *saradu* were disintegrated and their origin could not be determined. The further possibility, namely, that the jewel was taken by the accused either after the deceased was killed or that it was given to him by P.W.5 could not be completely ruled out in this case. In the circumstances we think, at any rate, the benefit of the doubt should be given to the accused.

The conviction and sentence are set aside, the accused is acquitted, and he is directed to be set at liberty.

N.T.R. — *Appeal allowed*

1. [1937] A.I.R. Lah 597

Reference No. 3 of 1948

December 7, 1948

SUBBA RAO & PANCHAPAKESA AYYAR, JJ.

THE KING
v.
ANDI THEVAN

Cr. P. C. (V of 1898),—S. 307—Reference—Verdict of Jury—Interference.

The High Court in a reference made under s. 307 Cr. P. C. can interfere with the verdict of the jury only if the verdict is perverse.

Reference under s. 307, Cr. P. C. 1898 by the First Assistant Sessions Judge of Madura division in C.C.No. 81 of 1948 dated 20-8-1948.

Assistant Public Prosecutor, for Crown.

JUDGMENT.

[SUBBA RAO, J.]

This is a reference under s. 307 of the Code of Criminal Procedure by the Assistant Sessions Judge, Madura. The four accused in the case were charged with an offence under s. 395 of the Indian Penal Code. The Jury by a majority of four to one found that the accused 1 to 3 were not guilty, and unanimously found that the fourth accused was not guilty. The learned Assistant Sessions Judge agreed with the verdict of the jury so far as accused 2 to 4 were concerned, but in regard to accused No. 1 he differed from the verdict of the jury and referred this case to the High Court. The evidence against the first accused mainly consists of the oral evidence of P. Ws. 3 to 5. The same evidence also was relied upon by the prosecution in regard to accused 2 to 4. The charge to the jury was very fair; and, in accordance with the directions given by the Judge, the jury appreciated the evidence and refused to believe the witnesses called by the prosecution. The law on the point is well settled. The High Court, in a reference made under s. 307 of the Code of Criminal Procedure can interfere with the verdict of the jury only if the verdict is such that no reasonable man would come to that conclusion, or, to put it in other words, the verdict is perverse. We cannot say on the evidence on record that the verdict in this case is such that no reasonable man would come to a conclusion which the jury has come to in this case. We, therefore, reject the reference and acquit accused No. 1 also.

N.T.R. —

FULL BENCH

Cr. R. C. No. 811 of 1947
Cr. R. P. No. 704 of 1947

February 24, 1949

HOWILL, GOVINDA MENON & BALAKRISHNA AYYAR, JJ.

S. P. THIRUVENGADASAMI NAIDU

v.

MUNICIPAL HEALTH OFFICER, KARAIKUDI

District Municipalities Act (Mad. Act V of 1920), *ss.* 249 & 313—*Order refusing licence —Prosecution—Jurisdiction of criminal court to question legality of order.*

In a case where a person is prosecuted for carrying on an industry or trade for which a licence to do so has been refused, it is open to the criminal court to find out whether the order of the statutory body was made without jurisdiction, whether on the face of it the order is illegal or whether it is unreasonable revolting or repugnant to conscience. But where the order is in the legitimate exercise of jurisdiction vested in the statutory body and passed bona fide *after considering the evidence before it, even if the order is wrong on the merits, the courts cannot hold that it is wrong. It is not the function of the court to substitute its judgment as an appellate authority for that of the statutory body. In cases where the party pleads that no licence is necessary, it is one of jurisdiction. But where the plea is that even though a licence is necessary, it has been refused on the merits, the plea cannot be considered as one involving jurisdiction at all.*

1930 *M.W.N.* 917 ; *Cr.* 221 : *I. L. R.* 53 *Mad.* 873 *F. B.* explained.

Petition under ss. 435 and 439 Cr.P.C. 1898, praying the High Court to revise the judgment of the Court of Additional District Magistrate of Devakottah dated 3–5–1947 in C. A. No. 16 of 1947 preferred against the judgment of the Court of the IInd Class Bench of Magistrates, Karaikudi, dated 3–2–1947 in .MT.C.No. 562 of 1946.

K. Veerasami, for Petr.

K. M. Murugappa Chettiar, for Respt.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER OF REFERENCE

[GOVINDA MENON J. 25—1—1948]

The questions raised in this case are of sufficient importance to be considered by a Bench and an authoritative pronouncement given thereon. The trend of the recent decisions, as seen from Criminal Appeal No. 415 of 1946 and *Commissioner Dindigal Municipality* v. *Rajamani Iyer* [1] is to the effect that a criminal court cannot go into the question as to whether a licence was refused for improper reasons, whereas a long catena of cases, beginning with *Queen Empress* v. *Veerammal* [2] followed in *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Iyengar* [3] strike a different note. On one side we have the decision reported in *Chairman, Municipal Council Chidambaram* v. *Tirunarayana Iyengar* [3], *Sesha Prabhu In Re* [4], *Ayyar & Co.* v. *Srinivasalu* [5] and other decisions holding that the Courts can go into the question of properiety, and on the other, the recent decision abovenamed, as well as the observations of Oldfield J in *Taluk Board, Bandar* v. *Inamdar of Chellapalli* [6] following Farwell L. J. I therefore refer this case for decision by a Bench. The papers will be placed before my Lord the Chief Justice for orders.

ORDER OF REFERENCE TO A FULL BENCH.

[GOVINDARAJACHARI & GOVINDA MENON. JJ]
15TH APRIL 1948.

GOVIDARAJACHARI, J: In the order of reference to a Division Bench made by one of us have been quoted several of the decisions bearing on the question which arises in this case, namely whether a criminal court cannot go into the legality of an order refusing a licence under the Madras District Municipalities Act. Besides those decisions, there is the decision of a Full Bench in *Muthu Balu Chettiar* v. *The Chairman Madura Municipality* [7], in which it has been stated that it is not within the province of a criminal court to determine whether the rules framed under the

1. [1941] M.W.N. 1073: cr. 165 (2)
2. [1893] 16 Mad. 230
3. [1928] M.W.N. 379: 51 Mad. 876
4. [1922] M.W.N. 79
5. [1941] M.W.N. 681: cr. 85: I.L.R. 1942 Mad. 73
6. [1920] M.W.N. 748:44 Mad. 156
7. [1927] M.W.N. 835:51 Mad. 122

Madras District Municipalities Act had been validly framed. The exact effect of that decision may have to be considered though we are told that it has not been referred to, or, if referred to not followed, in later decisions.

As the matter is of great importance and may frequently arise for decision, we consider that it is desirable that this case should be posted before a Full Bench of three, if not of five, Judges in accordance with the directions of the learned Chief Justice.

JUDGMENT

[GOVINDA MENON, J.]

This case came to be heard before this Full Bench on a reference made by one of us (Govinda Menon, J.) and Govindarajachari, J. as the matter is of great importance and the authorities on the point are conflicting.

The facts are simple and do not admit of any doubt. The petitioner was prosecuted before the Court of the Second Class Bench of Magistrates, Karaikudi, for an offence under S. 249 read with S. 313 of the District Municipalities Act, in that he, on 14—8—1946, was running a rotary oil engine without a licence from the Karaikudi Municipality and despite the refusal by the said Muncipality to issue a licence for the year 1946-47. A particlar area within the confines of the Karaikudi Municipality had been declared a "residential area" under S. 89(1) of the Madras Public Health Act and the same was published in the Ramnad District Gazette on 24-3-1943. The result of such a notification is that in that particular area the running of an oil engine even though it was existing before was prohibited unless a licence for that purpose was given by the municipality. Under S. 92 of the Madras Public Health Act (III of 1939) the consequences of such a notification under S. 89 are:—(1) that the construction or establishment of any new factory, workshop or workplace, or the carrying on of any new offensive trade in the areas specified in the notification shall be absolutely prohibited and (2) that in the case of any factory, workshop or workplace in existence at the time when the notification came into force or of any offensive trade in existence at such a time, the restrictions, limitations and conditions, if any, specified in the notification, shall be observed in the areas so notified. The oil engine in question was in existence in this area long before it was notified as a residential area and therefore it is that sub-clause (b) of S. 92 is attracted. On 25-2-1946, the petitioner applied to the municipality for the issue of a licence for running the oil engine during the year 1946-47 and on 8-3-46 orders were passed refusing the licence for the year aforesaid, and the said order was served on the petitioner on 9—3—1946, vide Ex. A-2. The grounds for the refusal of the licence are:—

1. The premises were untidy and there were jut holes and broken flooring.
2. Beds and tins were stored in the premises; and
3. The premises were situated in the residential area.

The petitioner again applied for modification of the order and for renewing the licence for running oil mills by machinery of 25 H. P. oil engine. This again was refused by order dated 22—3—1946, by which the Municipal Health Officer stated that with reference to the petitioner's application for licence and the office order served on him on 9—3—1946, the licence was refused for running four oil mills by machinery of 25 H. P. oil engine. Even though the permission to run the oil engine was refused, the petitioner continued to run it with the result that the prosecution was launched under the sections mentioned above. The petitioner's defence in the court of first intance was that the order refusing the licence was strong and since he had applied under S. 321(11) of the District Municipalities Act which provides that if a municipal Council accepted the pre-payment of the fee for a licence along with an application and the refusal to issue the licence was not communicated to the applicant within 30 days after the receipt by the authority of the application, then, the application shall be deemed to have been allowed for the year mentioned in the application and subject to the law, rules, by-laws, etc. The petitioner contended that the refusal of the licence was wrong and the municipal authorities should have granted the permission and therefore since no valid refusal was communicated to him within 30 days after the receipt of the application by the authority, he was entitled to run the oil engine. The trial court held that the petitioner had not proved by oral or documentary evidence that he took out a licence and since he ran the oil engine after the licence to run it had been refused he was guilty of the offence and a fine of Rs. 20 or in default simple imprisonment for two days was imposed on him. On appeal, even though the Additional District Magistrate of Devakottai referred to a decision of Devadoss J. in *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Iyengar* [1]

1. [1928] M.W.N. 379: 51 Mad. 876

he was of the view that the executive authority had power to refuse to renew the licence and that as all the reasons for refusal to renew the licence were not known and since it was legal and within the powers of the authority to refuse the renewal, he confirmed the conviction and sentence.

The petitioner's contention both before the Division Bench and before us is the same, viz. that the criminal Court before it imposes a punishment for an offence like the one in question, should go into the merits of the reasons for the refusal and find out whether on the facts and circumstances the municipal Council was justified in refusing the licence. In other words, the petitioner's contention is that the criminal court has power to find out whether the municipal authority acted rightly or wrongly in refusing the licence, thereby constituting the criminal court as a court of appellate authority in finding out the correctness of the order before the accused person could be found guilty. The learned Public Prosecutor on the other hand contends that it is not open to the criminal Court to re-open the whole matter in order to ascertain whether the refusal of the licence was justified on the material facts before the municipal authority. This question as well as allied and similar subjects had been considered in this court on many previous occasions and on account of the difference of view among the various Division Benches and single Judges of this court, the matter has now to be considered in detail.

As a prelude to the consideration of the case law on this topic, it is advisable to notice the various provisions of the Madras District Municipalities Act (V of 1920) and the Madras Public Health Act (III of 1939) which have a bearing on the subject at hand. Chapter XII of Act V of 1920 is headed "licences and fees" and S. 249 is the initial section under a sub-heading "Industries and Factories". This section lays down that a Municipal Council may publish a notification in the District Gaztte..........that no place within municipal limits............shall be used for any one or more of the purposes specified in Schedule V without the licence of the executive authority and except in accordance with the conditions specified therein. Schedule V mentions the purposes for which the premises may not be used without a licence under S. 249; and purpose (g) refers to "making soap, dyeing *boiling or pressing oil*, burning bricks, tiles, pottery or lime". S. 249, sub-sec. (3) states that the executive authority may by an order and under such restrictions and regulations as he thinks fit, grant or refuse to grant such licence. Sub-sec. (4) mentions the duration of the licence and sub-sec. (5) states that an application for renewal of such licence shall be made not less than thirty days before the end of every year. I have already referred to sub-sec. (11) of S. 321 to the effect that if within 30 days of the acceptance of the licence fee the municipal authority does not refuse the licence, the applicant shall proceed as if the licence had been granted. S. 321 (4) lays down that every order of a municipal authority refusing a licence or permission shall be in writing and shall state the grounds on which it proceeds. The order of the executive authority is not final, because S. 320 provides an appeal to the Municipal Council from any order of the executive authority granting or refusing to grant a licence or permission. The executive authority is defined in S. 3 (8–c) as the Commissioner of the Municipality, or if there is no Commissioner in charge, the Chairman. Reading this along with S. 16 of the Madras Public Health Act it is seen that the Health Officer of a local authority shall, perform such of the functions, and discharge such of the duties, or its executive authority in regard to public health matters under any of the provisions applicable to such local authority contained in the District Municipalities Act, subject to such appeal and control as the Government may, by general or special order, determine. Therefore the Municipal Health Officer in this case is the proper executive authority under the District Municipalities Act to grant or refuse to grant the licence. Another provision of the District Municipalities Act to which reference has to be made in S. 313 (1) (a) which is to the effect that whoever contravenes any provision of any of the sections or rules specified in the first column of Schedule VII.......... shall on conviction be punished ... ... Schedule VII provides that in contravening S. 249 (1) of the Act by using a place for any of the purposes specified in Schedule V without a licence or contrary to a licence (boiling or pressing oil), the offender shall be punished with a fine of Rs. 100.

It is common ground that on the refusal of the executive authority, which in this case was the Municipal Health Officer, to renew the licence, no appeal was preferred by the applicant (petitioner) to the Municipal Council as provided for in S. 322 of the Act. What the petitioner did was to ignore refusal of the licence on the ground that the action of the

Health Officer was wrong and unjustified and to continue to run the oil engine as if no refusal of licence ever took place. What is now contended by his learned counsel is that the order of the Municipal Health Officer dated 8—2—1946 refusing to renew the licence was an arbitrary exercise of power not referable to a proper appreciation of the facts and circumstances existing on the occasion and therefore it can be ignored. According to Mr. Virasami, the learned counsel for the petitioner, the executive authority was influenced by extraneous and irrelevant considerations and his refusal to renew the licence is a wrong exercise of the powers and as such amounted to the authority not functioning at all. He states that the authority being a public body ought to exercise the discretion in a judicial manner weighing the pros and cons properly and to come to a correct conclusion on the facts. If no such thing was done, then the order of the executive authority need not be taken note of and can be considered as *non est*. He further contends that on the authority of the decision in *Smith In re* [2] it is not obligatory upon the petitioner to exhaust his remedy by means of an appeal before transgressing the order which according to him is wrong or illegal.

We have therefore to consider the limits of the power which a criminal court possesses when it is approached by a local body for punishing a person for acting in violation of a certain permission or licence either granted or refused by it. Before we discuss the conflicting decisions of this court on the point, it is necessary to state briefly as we understand it the rules of practice and procedure a public or a quasi public body ought to conform to before refusing a licence or permission which it has power to grant or refuse. Though in India we have no bodies like the licencing justices as are existing in England, the functions of such bodies are similar to the functions of either the local, or municipal, or other statutoy bodies created by legislative Acts in England. In *Sharp* v. *Wakefield* [3] Lord Halbury L. C. lays down the rules and canons to be observed by Licensing Justices in the following term :—

> "An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said tht something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion ;.................... It is to be, not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself......"

In the circumstances of that case the House of Lords held that the Licencing Justices were justified in exercising the discretion in refusing the renewal of the licence. The distinction between the Licencing Justices and magistrates in England and the municipal or local bodies here is this : From the decision of the Licencing Justices, an application to quash the order lay to the Queen's Bench Division whose decision was subject to an appeal to the Court of Appeal and therefrom to the House of Lords. Therefore it is plain that in England the Licencing Justices figure as judicial functionaries and not as they do in this country; and when their actions can be traced to judicial authority, an appellate Court has necessarily to find out whether judicial actions were done according to law. Even so we are of opinion that even local, municipal, or other statutory bodies entrusted in India with the duty of granting or refusing licenses or permits ought to function as Lord Halsbury, L. C. says, not arbitrarily, vaguely, or fancifully, but in a legal and regular manner. Whether they have functioned like that can be ascertained by the appellate authority, which in this case is the Municipal Council, and the decision of the Council on such appeal according to S. 322(2) of the District Municipalities Act shall be final. It is the function of the Municipal Council to correct, modify, or set aside, the order of its executive officer by using its appellate power just as the Licensing Magistrates or Justices in England can be corrected by the divisional Court of the King's Bench and the Court of Appeal therefrom. The decision in *Sharp* v. *Wakefield* [3] referred to above on which the learned counsel for the petitioner placed reliance is a useful and helpful guide only where the appellate authority from the executive authority of the Municipality is approached to exercise its appellate powers. When a criminal court has to find out whether any person has contravened any provisions of the section or the rules specified in Schedule V of the District Municipalities Act, it cannot scrutinise the order of the executive authority of the Municipality as if it is sitting as a Court of appeal over the Municipality.

We have now to notice the conflicting decisions of this court. The trend of modern

2. [1923] 45 M.L.J. 731
3. [1891] A.C. 173

authority is to the effect that it is not competent for a criminal Court, when a person is prosecuted for running a factory or doing an act, without a licence for which a licence is necessary, to find out whether the refusal of the licence was justified on the facts. In *Commissioner, Dindigal Municipality* v. *V. Rajamani Iyer* [4] Lakshmana Rao J. was of opinion that when the executive authority of a Municipality declined to renew licence, it was not open to the criminal court to acquit the accused on the ground that the order of refusal is not valid. In that case the trial court acquitted the accused of an offence under Ss. 249 and 313 of the Madras District Municipalities Act for running a coffee hotel and preparing and selling sweetmeats in unlicensed premises when his application for renewal had already been rejected. The reason given by the trial Court was that the executive authority had not applied his mind to the application for renewal and had not inspected the premises as he was bound to do to satisfy himself that they were really dirty so as to warrant the refusal to renew the licence. Therefore the refusal to renew was treated as invalid and the Court was justified in going into the validity or otherwise of the order. Lakshmana Rao, J. disagreed with the reasons given by the trial Court holding that it was not competent for a criminal Court under the circumstances to go into the question regarding the correctness or otherwise of the reasons for refusing to renew the licence. In *The Public Prosecutor* v. *A. O. A. A. Abdul Hamid Rowther* [5] our learned brother Yahya Ali, J. took the same view though he did not refer to the judgment of Lakshmana Rao, J. Relevant portions of Yahya Ali, J's judgment are as follows:

> "The facts that the licence was refused and the mill was run after the expiry of the period of licence is not disputed. The Sub-Magistrate, however, took it upon himself to canvass the reasons which actuated the President of the Panchayat Board to refuse the licence. Clearly he was not entitled to do that. There are appellate authorities constituted under the statute itself, who are empowered to deal with that aspect of the matter."

On this reasoning, the order of acquittal was set aside. To practically the same effect is an earlier decision in *Krishnaswami In re* [6]. In that case Krishnan, J was of the view that where an accused was convicted for having contravened s. 166 (1) of the Local Boards Act, by having plied his motor car without a licence, after he had applied for the licence but the same was refused to him, and the order of refusal had also been communicated and it was contended that the President was actuated by personal malice and ill-feeling and hence the case should be treated as one under S. 212 (11) of the Act in which no order had been passed, that the conviction was right even if the President was so actuated by any personal feelings and that the accused could only be entitled to claim damages on establishing that fact. A criminal court cannot treat the refusal of a licence as one under s. 212 (11) of the Local Boards Act (equivalent to s. 321 (11) of the District Municipalities Act) to the effect that the licence should be deemed to have been granted. In doing so, the learned Judge observed thus:

> "We are not concerned at present with the question whether that order was properly passed or not. We have only to see if the provisiens of law have been complied with. It is true clause (4) of s. 212 requires the grounds to be stated, on which the order of the President is passed; but the grounds have been stated by the President in his order. As held by the Bombay High Court, in a similar case, arising under the City of Bombay Municipal Act, the fact that the person authorised to grant or refuse the licence did not exercise his discretion reasonably in refusing to grant the licence is not one that could afford an answer to a charge that the accused had done something for which a licence was necessary and for which he had no licence. No authority has been brought to my notice to the contrary. I am therefore prepared to follow the view taken by the Bombay High Court; and I hold that the conviction is correct."

None of the three cases above referred to makes a mention of a large body of case law which have preceded them to the effect that it is open to a criminal court under certain circumstances to enquire into and find out the correctness or legality of the order of the executive authority of the local body refusing to grant licence. On a reference to the decision in *Commissioner, Dindigul Municipality* v. *V. Rajamani Iyer* [4] it is seen that the trial Court in that case had referred to the decision of Devadoss J. in *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Iyengar* [1] of which notice had already been

4. [1941] M.W.N. 1073 : Cr. 165(2)
5. Cr. App. No. 415 of 1946
6. [1925] M.W.N. 47

taken of. But Lakshmana Rao, J. in his judgment does not even notice it. As early as 1892, a similar question arose before Muttusami Ayyar and Best, JJ. in *Queen Emprees* v. *Veerammal* [7]. The facts of that case were as follows :

A landowner in a municipality, subject to the District Municipalities Act then in force, which did not differ in salient aspects regarding the question of licence from the present Act, applied for a building licence under section 180 of the Act then in force. The Municipality had resolved that a portion of the land was required for widening a public lane, and therefore ordered the applicant not to build upon that portion but to abstain from doing so and granted a licence for the building to be erected on the remaining portion. The landowner however erected a building even upon the interdicted portion of the land whereupon the Municipality, having received a refusal from the landowner to demolish the structure built upon the portion for which no licence was given prosecuted the landowner under the relevant sections of the Act for building upon a piece of land without obtaining the licence. Muttusami Ayyar and Best JJ. came to the conclusion that the prosecution was unjustified because the order of the Municipal Council was illegal and consequently no offence had been committed by the landowner. In the course of the judgment Best J. observed that the Municipal Council had no power conferred upon it of depriving an owner of the legitimate use of the land. S. 180 of the Act was intended only to ensure the safety and sanitation of the buildings to be newly erected and what the council had to consider was the plan of the proposed building and the grounds on which the same can be disapproved. The learned Judge further observed that against the order of the Municipal Council there was no appeal allowed by the law. The civil Courts were empowered only to award damages and cannot cancel the licence. In observing thus, the learned Judge was of opinion that the trial Court should have considered the legality of the order of the Municipal Council and declined to convict on his finding it to be illegal. Since the prosecution was not based on a legal order, the conviction was held unsustainable. This case does not go to the extent of holding that a criminal Court can canvass the correctness of an order of the executive authority of the Municipal Council refusing to grant a licence where a licence had been applied for. On the very face of it, a municipality cannot refuse a licence to build on a particular plot of land on the ground that that piece of land is required for a certain object without previously taking the necessary steps for acquiring the land for that purpose or otherwise. Therefore so far as this decision goes, the order which, the municipality complained, was transgressed by the landowner was not only illegal but *ultra vires* the powers of the municipality and without jurisdiction. The reason for coming to the conclusion that the refusal of the licence was illegal is stated to be that under S. 180 of the Act the Municipal Council was not empowered to deprive the owners of the legitimate use of the land, because the section only meant to confer powers to ensure the safety and sanitation of buildings. The next case to which our attention was drawn is the judgment of O'Farrell and Michell JJ in *Subrahmanya Aiyar* v. *Asirvadam Pillai* [8]. In that case an application was made to the Municipal Council for a licence to erect a building with a thatched roof and the same was refused under a misapprehension that the land on which it was proposed to build was public land. Without heeding to this refusal the applicant errected a building on the land with a tiled roof. When he was prosecuted for failure to take out a licence before constructing the building, the answer was that the sanction had illegally been refused and that a roof having been mentioned in the application, the more change in the material of the roof did not make the building substantially different from that applied for so as to constitute an offence under S. 180 of the Act. The principle on which this decision was based turns out to be that the prohibition by the Municipal Council from having the building erected was due to the erroneous belief that the land sought to be built upon was public land. Therefore here also, the refusal was not on the merits of the facts contained in the application but on a thoroughly extraneous matter which had no bearing on the subject before the Council. The refusal to grant the licence was due to a mistake which went into the root of the matter and therefore the refusal was an act without jurisdiction and was void. The next case on which reliance was placed by the petitioner's counsel is reported in *Sesha Prabhu In re* [9] and deals with S. 249 of the present Act. There the accused was convicted and

7. [1893] 16 Mad. 230

8. [1899] 9 M.L.J. 337

9. [1922] M.W.N. 79

sentenced for the offence of storing and selling grain within the Cannanore municipal limits without the licence of the Chairman under Ss. 249 and 338 (b) of the Madras Act V of 1920 (the Act now under consideration), contrary to a notification issued in July 1920 by the municipal council constituted under the repealed Act of 1884 purporting to act under s. 249 of the new District Municipalities Act V of 1920, some 2 1/2 months before the new Act was put in force. The learned Judges held that the whole procedure was void *ab initio* and that no conviction can be sustained because of the notification issued by a council constituted under an Act which did not authorise it before the new Act which created the offence came into force. Both the learned Judges were of opinion that the action of the Council in notifying some 2 1/2 months before the new Act was brought into force was devoid of any jurisdiction and was therefore utterly void. Such a notification is, in our opinion, nothing but a waste paper because the Body that issued it was not empowered to do so under the law. It was also held that the circumstance that the accused was in no way prejudiced was immaterial when the question arises in connection with the application of a penal provision, as a strict construction of the law is required in such a case.

The next relevant case on this part of the contention is the one reported in *Ellemmal In re* [10]. S. 171 (3) of the Local Boards Act XIV of 1920 provided that a panchayat shall, as regards private markets already lawfully established, grant the licence applied for subject to such regulations as to supervision, inspection and such conditions as to sanitation, drainage, water-supply, etc. In accordance with this provision of law, the owner of a private market which was existing before the commencement of the Local Boards Act XIV of 1920, applied for a licence to continue the same and licence was refused by the Panchayat Board on the ground that it considered it undesirable that the market should be kept open there. The petitioner, in spite of this refusal, carried on the private market which was unlicensed, and sold fish in the market. He was convicted by the trial Court for running a private market without a licence. In revision Jackson and Tiruvenkatachariar JJ. set aside the conviction holding that the order of the Board refusing the licence was not a legal order passed in exercise of their powers under the Act. Jackson J. went further and laid down that refusal to function under the Act is not passing an order under the Act. The order, in order to be effective, must be *intra vires*, and an order *ultra vires* is no order at all. When the statute makes it obligatory upon the panchayat to grant the licence applied for subject only to the conditions prescribed thereunder, the action of the Panchayat Board in totally refusing the licence cannot be said to be in exercise of the powers under the Act. Such being the case, the order refusing sanction should be deemed to have no existence whatever; and on this ground it was held that the action of the Panchayat Board, if upheld, would amount to confiscating private rights without compensation, which intention cannot be attributed to the legislature. Though the Panchayat Board might impose conditions in the interest of public health in granting the licence, it has no power to refuse the licence totally and therefore the refusal of the licence cannot be held to be invalid exercise of the powers conferred under the Act. It is clear that the learned Judges set aside the conviction mainly on the ground that the order refusing the licence was one not passed in exercise of the powers conferred under the Act. It is difficult to see how the facts of this case can be made to fit in with the facts of the case before us.

We have next to consider a few cases on which the petitioner's counsel has placed great reliance and which, on a casual or cursory examination, seem to support his contention. In *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Ayyangar* [1] Devadoss, J. had to consider an allied topic. The circumstances which led up to the consideration of the question by Devadoss, J. can be shortly stated in the following words :—A coffee hotel keeper had a licence for carrying on the business for the year 1926-27. As he had incurred the displeasure of the Chairman for some reason, notice was issued cancelling the licence. Without carrying for such cancellation, he carried on the business and was prosecuted for keeping a coffee hotel without a licence as required by s. 249 and schedule V of the District Municipalities Act. The Court of First Instance acquitted the person complained against, i.e. the hotel keeper, on the ground that the prosecution had failed to justify the order cancelling the licence with the result that the Municipal Council came up in revision to this court to set aside the order of acquittal. After discussing the merits of the case, the learned Judge came to the

10. [1927] M.W.N. 801

conclusion that however reprehensible the conduct of the coffee hotel keeper may be in not paying the water-tax due to the municipality, that would not be a ground for cancelling his licence to carry on the business of a coffee hotel keeper; and that therefore the cancellation of the licence was *ultra vires* the powers of the Chairman of the municipal council. Then the learned Judge proceeded to discuss the question as to whether it was permissible for a criminal court, which has seisin of a prosecution like the one in question to go into the merits of the cancellation. The arguments advanced before him by the counsel for the municipality was that it was not open to the court to go into the validity or otherwise of the cancellation because it is outside the province of the court trying an accused person for an offence under the Municipal Act to go into the question whether the order made by the Chairman is proper or improper. In the discussion of this question, a distinction was drawn between the case of a refusal of a licence asked for the doing of a thing and the cancellation of a licence which a person had properly obtained. At page 880 the learned Judge observed that in the case of a refusal of a licence it may be that the Municipal Chairman has some reason for refusing it and it would not be open to the court to consider whether the reasons were good or bad, for no reasonable man who is acting as Chairman would refuse to grant a licence unless he has some reason for refusal. He further observed as follows:

> "But if it is patent to the court that there could have been no reasons, the court could come to the conclusion that the refusal amounted to not doing what is required by the Act but something which is outside the Act and such refusal might be considered to be *ultra vires* the Chairman. In the case of a licence which has been granted and which is good for a period it would be *ultra vires* the Chairman of the Council to cancel it or suspend it for not something which the licensee did in the contravention of the terms of the licence but for something which was unconnected with the licence. In such cases the court is not prevented, by anything contained in the District Municipalities Act, from holding that such an act was not within the ambit or within the scope of the powers vested in the Chairman of the Council by the Act and therefore the reason for doing such an act would not arise for consideration."

The learned Judge also refers in addition, to the case in *Queen Empress* v. *Veerammal* [7], *Municipal Council, Chicacole* v. *Seetharamayya Nayudu* [11] and to the decision of Krishnan J. in *Krishnaswami* v. *Emperor* [6]. In upholding the conviction in the last mentioned case, for driving a car without a licence, Krishnan J. observed as follows:—

> "I do not think that his order can be regarded as an absolute nullity as is argued and the case considered as one in which no order has been passed. It may be that the accused can claim damages against the President if he is able to establish that the President exercised his powers under s. 212 not *bona fide* but with malice on account of personal ill-feeling against him. That question will have to be considered when a proper case is brought; but in this prosecution, the accused, in order to escape punishment, must show that he had a licence given by the President of the District Board or he comes under clause 11 of s. 212".

In another place Devadoss J. after quoting the above observes that it may be that the refusal to grant a licence may be for proper and valid reasons and the court cannot go into the validity of the reasons or the expediency of the occasion which necessitated the refusal of the licence and a court is bound to assume that the Chairman has acted properly; but that where he is bound to do a certain thing and he does not do it or where he is not permitted to do a thing and he does it, it cannot be said that the court could not go into the question of the validity of the omission or act especially when a prosecution is launched against a person for violating the illegal or *ultra vires* order of omission or the act of the chairman. Again he reiterates at page 885 that where the order is within the powers of the Chairman of the Council or sanctioned by the rules framed under the Act, *it is not open to the Magistrate or the Court to go into the necessity, expediency or the reasonableness of the order.* The learned Judge concluded by holding that in the case before him the order of the Chairman was *ultra vires* and therefore it was open to the court to go behind it. We are far from convinced that the facts of that case have any similarity to the present case. Devadoss J. was definitely of opinion that in cases where the order was *ultra vires* it was open to the magistrate to go into its validily. But where it is sanctioned by the rules framed under the Act, the magistrate cannot go into the necessity, expediency or the reasonableness of the

11. [1925] 21 L.W. 280

order. During the course of arguments in that case reference was made to the observations of the Full Bench in *Muthu Balu Chettiar v. Chairman, Madura Municipality* [12]. The Full Bench had considered the necessity of taking out a fresh annual licence under S. 249 of the Act when permission to construct or establish a factory or instal in any premises a machinery had been obtained under S. 250 of the Act. Agreeing with the view taken in *In re Muthu Balu Chetti* [13] by Odgers and Madhavan Nair JJ. and dissenting from the view of Devadoss and Waller JJ in *Madura Municipality* v. *Muthu Balu Chetti* [14] the learned Judges of the Full Bench held that an annual licence under S. 249 of the Act was necessary. Incidentally it was observed that a magistrate cannot take cognizance of a plea questioning the validity of the order disobeyed by the accused. The offence charged there was under S. 338 of the Act and consisted in using a rice mill without the licence prescribed by the rule, bye-law or regulation made under the Act. As the necessary rules have been framed in that case, it was held by the Full Bench that it was not within the province of the Criminal Court to determine whether such rules have been validly framed—a matter which should be left for determination in a civil court. As observed by Devadoss J the observations of the Full Bench came to this effect, viz. it is not to a Criminal Court to probe into the terms or details of a licence or the validity of its terms and this is all that is meant by the observations of the Full Bench. In short, the decision of Devadoss J. distinguishing the observations of the Full Bench, lays down that where the act of the statutory body, whether it be the Chairman or a whole Council, is *ultra vires* and a court is asked to convict a person for violation of such an order, the court is not prevented from considering its legality. But where it is within the powers of the statutory body or sanctioned by the rules framed under the Act, it is not open to the Magistrate or the Court to go into the necessity, expediency, or the reasonableness of the order.

Practically to the same effect is a more recent ruling where Mockett J. in *Ayyar & Co.* v. *Srinivasalu* [15] was of the view that when there is no provision in the District Municipalities Act either directly or by implication to enable the municipality to levy a licence fee for advertisements, the council, which has power to make bye-laws for prohibition and regulation of advertisements in public streets and parks, cannot levy a licence fee in respect of such advertisements. Basing its authority on clause 28 of s. 306, the Coimbatore Municipal Council levied a licence fee on the petitioner for advertising on his bullock cart and by means of a board hung over its roof. For not taking out a licence before the said advertisements were put up the Municipal Council prosecuted him and the petitioner before the High Court was convicted by the trial Court. In revision Mockett, J. held that the action of the Municipal Council in enacting the bye-law was *ultra vires* because prohibiting and regulating advertisements in public streets and parks did not imply the power to levy a licence fee. Here also the decision depended upon the *ultra vires* nature of the order or bye-law which was not obeyed or adhered to by the party. One of us, (Horwill, J.) considered a similar question in the case reported in *The Public Prosecutor* v. *Ponnuswamy Mudaliar* [16] where it was contended for the prosecution in an appeal against the acquittal that the trying magistrate had no power to find out whether the order of the Local Board which was contravened by the accused therein was correct or not. The question depended upon the ownership of the land over which the front portion of a verandah extended and the trial court held that though the evidence was weak the matter was of a civil nature and acquitted the accused on that ground. In appeal under s. 417, Criminal Procedure Code, this court held that the Magistrate cannot avoid his responsibility to go into the question of the ownership of the land and decide the dispute as to the best of his ability. It was further held therein that any case launched under the encroachment provisions of the Local Boards Act is necessarily of a civil nature and the Court has to decide whether the land to be encroached upon belonged to the Local Board or to the private party. This case is similar in some respects to the earlier one reported in *Subramania Ayyar* v. *Asirvadam Pillai* [8] where the question of the ownership of the land had to be decided. If the land belonged to the statutory body or to the Crown, then the action of the accused was wrong and he was liable to be punished. If,

12. [1927] M.W.N. 835: 51 Mad. 122
13. [1927] M.W.N. 831: 50 Mad. 467
14. [1926] M.W.N. 651
15. [1941] M.W.N. 681: Cr. 85: I.L.R. 1942 Mad. 73
16. [1943] M.W.N. 344 : Cr. 72

on the other hand, the land belonged to the party himself, the action of the Local Body was thoroughly without jurisdiction and *ultra vires*. On account of the particular nature of the dispute, it is incumbent upon the court to find out whether the action was within the powers of the statutory body or not.

We have so far discussed cases where prosecutions were launched for non-compliance with certain directions of orders of the statutory body or refusing to take out a licence and matters of such nature. Another line of cases to which our attention was invited relate to civil actions questioning the validity or otherwise of the orders or bye-laws promulgated or passed by the statutory body and where the citizen did not conform to such orders. Subramanya Ayyar and Davis, JJ. in *Somu Pillai* v. *The Municipal Council, Mayavaram* [17] were of the view that the power conferred by the provisions of the District Municipalities Act on the Chairman of a Municipality to license places for selling meat etc. only empowered him to consider the propriety of granting or withholding the licence in each case and not to enter into agreements which would preclude him from considering any such application except from a particular person or persons. It was further held that the power to interfere with the ordinary rights of citizens will not be inferred in the absence of an express grant unless it be necessarily implied as incidental to the other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given. When the Municipal Council entered into a contract with the plaintiff to grant and secure to him the exclusive right of selling fish within the municipal limits of Mayavaram for a period of one year in consideration of the payment of a certain sum of money and a suit for damages was brought on the footing of such a contract, it was held by this court that such an undertaking by the municipality was illegal and void and the question must therefore be gone into in a civil suit. A really instructive case is the one reported in *Taluk Board, Bandar* v. *Zamindar of Chellapalli* [18] in which the facts were the following:—On a report from the District Medical and Sanitary Officer of Krishna that three tanks belonging to the Zamindar of Chellapalli were injurious to the health of the villagers, the President of the Taluk Board acting under s. 100 of Madras Act of 1884 by notice required the owner of the tank to clean, fence and fill up the tanks, because on inspection it appeared to him to be dangerous to the health of the people in the neighbourhood. On failure to comply with the notice, the Board threatened to fill up the tank and collect the charges from the Zamindar. On this notice, a suit was brought for an injunction against the Board restraining it from filling up the tanks as the Zamindar did not act according to the notice issued. The question for consideration was whether the President of the Taluk Board had authority to act as he did under S. 100 of the Act. It was held that the power conferred under S. 100 of the Local Boards Act, though a very wide power, must not be exercised for ulterior purposes, or in a capricious, wanton and arbitrary manner, and if so used, can be controlled by the Civil Courts and as the order in question passed by the Board was one such it should be set aside by the Civil Court. In this case the finding was that the tanks became insanitary on account of the action of the Taluk Board itself in allowing drainage water to escape into the tanks. Abdur Rahim J. at page 158 observes as follows:—

> "The rulings to which we have been referred show that if there were materials before a local authority to come to such a conclusion it is not for the Civil Courts to enquire into the sufficiency or otherwise of those materials. It is for the Board to decide upon the evidence whether a certain tank is dangerous or injurious to the health of the neighbourhood, and when such decision is arrived at it is not for the court to interfere with it on the ground that the Court would have come to a different conclusion".

But as stated above, the learned Judge held that if the decision was arrived at in a capricious, wanton, arbitrary or unreasonable manner, the Court can interfere. Oldfield J. agreed with the same view and followed a dictum of Farwell, L. J. In *Rex* v. *Board of Education* [19] which is in the following terms:

> "If the tribunal (public body) has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the public body, but they have power to prevent....the refusal of its true jurisdiction by the adoption of extraneous considerations in arriving at its conclusion or deciding a point other than that brought before it, in which cases the

17. [1905] 28 Mad. 520
18. [1920] M.W.N. 748 : 44 Mad. 156
19. [1910] 2 K.B. 165 (179)

courts have regarded it as declining jurisdiction."

In *Rex* v. *Board of Education* [19] Cozens Hardy, M. R. observed at page 174 that if the decision of the statutory body is based on a wrong interpretation of the statute, it is not absolute in the sense that no court can interfere with, or review it. In all matters of fact not involving a wrong construction of a statute, the decision of the Board of Education which was the statutory body in that case was final. But where the decision was so perverse as really to amount to a non-exercise of jurisdiction entrusted to the Board, the court can interfere by issuing a writ of certiorari. There are other passages also than the one already quoted by Oldfield, J. in the judgment of Farwell, L. J. where observations of a similar nature can be found. It seems to us that the English Courts have considered that their power to interfere in proceedings brought to set aside orders of statutory bodies by the exercise of prerogative *writs* has been interpreted as more in the nature of a revisional exercise in questions of jurisdiction than as an appellate authority reviewing evidence.

The decision of Stone, J. in *Venkatachallam* v. *The Commissioner, Corporation of Madras* [20] was based on a motion for the issue of a *writ of certiorari* to the Commissioner of the Corporation of Madras, for the quashing of an order in the matter of issuing a licence for a condiment factory. The learned Judge held that the order of the Commissioner refusing to issue the licence for the carrying on of the factory and directing the party to close the business was one made without any statutory or proper authority and should be quashed. After discussing the various provisions of the City Municipal Act and the powers and rights of the Corporation as well as its Standing Committee, the learned Judge came to the conclusion, on an application for a *writ of certiorari*, that the action of the Commissioner was *ultra vires* and without jurisdiction. Similar observations regarding the powers of a Civil Court to set aside orders passed by statutory bodies are found in *Corporation of Madras* v. *Madras Electric Tramways Ltd.* [21]. It is therefore clear that the actions of a Statutory Body can be questioned in a Civil Court and to some extent the wrong interpretation put upon laws and regulations by the Statutory Body can be corrected in proper civil proceedings taken by parties to rectify the mistakes committed by the Statutory Body.

It is necessary to refer to two more decisions which, though they do not relate to prosecutions for carrying on business without taking proper licences, were concerned with the validity or otherwise of bye-laws and how far a criminal court can consider such matters. The decision in *Satyanarayana* v. *Yorke* [22] is a case of that kind. Bardswell J. after a review and discussion of the relevant case law on the subject was of opinion that a bye-law or any rule or order of the kind, as to the taking out of a licence, is not bad merely because the licence fee is excessive. The question of the legality of ordering that a licence should be taken out and that of the reasonableness or unreasonableness of the fees charged for such a licence, are separate and independent questions, the legality of the order not being dependant on the fees being reasonable. The reasonable and equitable nature of a bye-law framed by the local body is a matter open to the criminal courts to consider when offenders against the bye-laws are put up for prosecution before them. The learned Judge further held that where the licence fee levied is excessive and cannot be justified, the court will refuse its summary recovery under the provisions of the Local Boards Act. This was a case where the prosecution was launched for failure to take out a licence for manufacturing certain arrack with machinery etc. and the learned Judge considered the question of the reasonableness or otherwise of the bye-law passed. The learned Judge referred to the judgment of Wallace J. in *Kunhambu* v. *Local Fund Overseer, Chirakkal* [23] in a case referred to him on a difference of opinion between Waller and Krishnan Pandalai JJ. The principle underlying this decision is that when a criminal court is approached by a statutory Body for the realisation of a licence fee by proceedings of a summary nature, it is open to the court to find out whether the licence fee levied is so unreasonable that its summary recovery should not be ordered. A distinction has to be drawn regarding the powers of a criminal court when its machinary is sought by the Statutory Body for recovering a licence fee, a tax or tithe, and cases where a citizen is prosecuted for carrying on a business or industry without a licence where the statutory body, rightly or wrongly, but *bona fide*, refused the licence. In the former case it is open to the court to weigh the evidence and find out whether

20. [1933] 65 M.L.J. 860
21. [1931] M.W.N. 73: I.L.R. 54 Mad. 364
22. [1933] M.W.N. 102: Cr. 14
23. [1932] M.W.N. 873: Cr. 189

the statutory body was justified in levying an unreasonable fee. But in the latter case where the Statutory Body acted *bona fide* and honestly considering the materials before it, even if on the same materials the court would have come to a different conclusion, it is not open to the court to sit in judgment over the delibrations of the Statutory Body as if there was an appeal to it. But, as we have already shown by the cases discussed supra, where the matter is one of jurisdiction or *ultra vires* nature of the proceedings, it is open to the court to go into the validity of the proceedings.

The only other case which has some relevency to the question under consideration is a Full Bench decision reported in *Ramaswami* v. *President, Taluq Board, Tadepalligudem* [24] where Curgenvan, J. delivering the opinion of the Full Bench observed that when a Local Board moves a magistrate to recover a penalty for an alleged encroachment on land belonging to the Board, the defaulting party can plead that there was no encroachment at all and the Magistrate can go into the question whether the alleged encroachment was true or not and whether the imposition of the penalty was justified or otherwise. Here also the question is one of jurisdiction because if there was no encroachment at all, the action of the Board in levying a penalty is on the face of it, void. The conflicting views which were prevalent before that, as manifest in the reported cases, viz. *Ramachandra Servai* v. *President, Union Board, Karaikudi* [25] *Rengesa Rao* v. *Swaminatha Aiyar* [26] and *Local Fund Overseer, Devakottai* v. *Subramania Chetty* [27] on the one hand to the effect that the court cannot in such matters go into the merits of the case and those exemplified by *Union Board of Paramakudi* v. *Chellasami Thevar* [28] and *Syed Mustapha Sahib* v. *Union Board of Kaveripatnam* [29] on the other that under such circumstances it was open to the accused person to raise the question whether the encroachment was true or not, were discussed before the Full Bench and it was held that the correct view was that laid down by Phillips and Madhavan Nair, JJ. in *In re Gopayya* [30] wherein they dissented from the opinion of Wallace and Devodoss, JJ. in *Ramachandran Servai* v. *President, Union Board, Karaikudi* [25]. During the course of the judgment, the Full Bench observed that it was not disputed before them that where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the court, in disposing of the case, to undertake an enquiry whether the notice was validly issued. We are not satisfied that the statement of the law so broadly stated can be accepted. To the extent to which the Full Bench was engaged in considering the question referred to it, we find no difficulty in accepting their view, because as stated already when the local body wants to recover a sum of money, which sum was contingent upon the satisfaction of conditions laid down by the provisions of the statute, then it would be legal to levy the amount if such conditions are satisfied, as in that case the question of encroachment. In view of the pronouncement of the Full Bench above referred to, it is unnecessary to consider in detail the cases discussed in that judgment for we do not think it necessary to dilate more upon this topic.

Two recent decisions of single Judges of this court relating to prosecutions for offences under s. 15 (b) of the Madras General Sales Tax Act wherein the question of burden of proof on the prosecution to establish affirmatively that the accused was liable to pay the tax was considered and decided in favour of the accused, were quoted before us, the earlier of them by Kuppuswami Ayyar, J. in *Public Prosecutor* v. *Khader Khan* [31] and the latter by Yahya Ali, J. in *Public Prosecutor* v. *Chakka Kondappa* [32]. We do not think that these cases are very helpful in the consideration of the present question. All that was decided in those cases was that just like any other criminal case, the prosecution should prove affirmatively that the tax is due. The learned advocate for the petitioner referred to s. 5 (2) of the Criminal Procedure Code laying down that all offences under any law other than the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offence. Reference was also made to ss. 29 and 261 (b) of the Code. From these he

24. [1930] M.W.N. 917 : Cr. 221 : 53 Mad. 873 F.B.
25. [1925] M.W.N. 743 : 49 Mad. 888
26. [1927] 27 L.W. 320
27. [1926] 39 M.L.T. 205
28. [1926] M.W.N. 676
29. [1926] M.W.N. 678
30. [1928] M.W.N. 319 : 51 Mad. 866
31. [1946] M.W.N. 762 (2) : Cr. 147 (2)
32. [1947] M.W.N. 325 : Cr. 65

argued that the Code does not place any restriction upon the powers of the Court in the matter of an enquiry or trial regarding an offence committed against laws other than the Penal Code. No doubt it is open to the Court to find out whether the ingredients of the offence defined in the Indian Penal Code have been satisfactorily established in the trial of an offence under the Indian Penal Code. We feel no difficulty in holding that the Court has the power to find out whether the offence was committed or not and that is all that is laid down by the provisions of the Criminal Procedure Code referred to above. But it is a different thing to say that even though *prima facie* an offence is committed by contravening the provisions of a special law, still it would be deemed that there would not have been such a contravention if there had been no occasion for such contravention. The law of procedure is not different in the trial of cases under the Indian Penal Code and those under others statutes according to s. 5 of the Criminal Procedure Code except that in the case of offences under other laws the procedure laid down by the Criminal Procedure Code is subject to any enactment for the time for regulating the manner or place of investigation, enquiry or trial. When s. 322 (2) of the District Municipalities Act says that the decisions of the Council on appeals against the order of the executive authority granting or refusing to grant a licence or permission shall be final it should be deemed that a criminal Court trying an offence for contravening certain provisions of the District Municipalities Act can only be subject to the finality as contemplated in s. 322 (2). Mr. Virasami relied on the observations of Krishnan J. in *Smith In re* [2] where the learned Judge held that in a prosecution for the offence of non-payment of the licence fee payable for erecting a machinery under s. 288 of the City Municipal Act, the fact that the accused did not appeal to the Standing Committee against the imposition of the fee does not preclude him from raising the plea that the machinery was not one in respect of which a licence was required, and that he was therefore not bound to pay the same. Here again the question is one of jurisdiction. Where the order of the executive authority was *ultra vires* and without jurisdiction, it is as if no such order is in force. Such being the case, it is not necessary to appeal against an order which is without jurisdiction. It can be taken as if it never existed. But in the present case, the order of the executive authority refusing to grant the licence for running the oil mill on the ground that it is situated in a residential area cannot be said to be an order without jurisdiction for it is not pretended that the oil mill is one for the running of which a licence is not necessary at all. The petitioner himself applied for the licence and he has never pleaded that the provisions of the District Municipalities Act relating to licences are not applicable to his oil mill at all. All that he contends is that in view of the fact that the oil mill was in existence prior to the differentiation of areas into industrial and residential areas, he was entitled as a matter of right to be granted a licence. To a state of circumstances like this the passage in Maxwell on Interpretation of Statutes, Ninth Edition at page 129, to the effect that in a statute which lays down that where something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute, cannot be said to have any direct application.

The learned Public Prosecutor contended that there exists a distinction where a party contravenes any of the provisions of the sections of the District Municipalities Act or rules specified in Schedule V and the recovery of fines as contemplated in S. 344 of the same statute. In the former he contended that the court investigating offence has no power to go into the merits of the order contravened; whereas in the latter, where a sum of money is sought to be recovered, the question whether the amount is really due or not is one which a court has to go into. He invited the attention of the court to the cases of profession tax contemplated by rule 29 of Schedule IV. We have already discussed the difference between the two categories of cases when dealing with *Satyanarayana* v. *Yorke* [22] and *Kunhambu* v. *Local Fund Overseer, Chirakkal* [23].

To sum up the result of the above discussion of the case law, we think that in a case where a person is prosecuted for carrying on an industry or trade for which a licence to do so has been refused, it is open to the court to find out whether the order of the Statutory Body was made without jurisdiction; whether on the face of it the order is illegal or whether it is unreasonable, revolting or repugnant to conscience. But where the order is in the legitimate exercise of jurisdiction vested in the Statutory Body and passed *bona fide* after considering the evidence before it, even if the

order is wrong on the merits, the Court cannot hold that it is wrong. It is not the function of the court to substitute its judgment as an appellate authority for that of the Statutory Body. In cases where the party pleads that no licence is necessary, it is one of jurisdiction. But where the plea is that even though a licence is necessary it has been refused on the merits, the plea cannot be considered as one involving jurisdiction at all.

We have been taken through the orders of the lower courts as well as the exhibits filed in the case. We do not think that the action of the municipality in refusing the licence on the ground that the premises are situated in a residential area is without jurisdiction. The petitioner has not appealed to the Council against this order. As has been laid down in a number of cases, it is open to the aggrieved party to have his remedy in a civil court by instituting a suit for an injunction or resorting to one of the prerogative writs allowed by law if such a remedy is available to the party. Without resorting to those remedies, it is not open to the petitioner to contend when he is prosecuted for running an oil mill after the licence to run it has been refused, that the licence should have been given to him and that the order of the executive authority is wrong on the merits. We are therefore of opinion that the decision of the lower court is right. This revision petition is dismissed.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 1372 of 1947
Cr. R. P. No. 1347 of 1947
November 26, 1948
GOVINDA MENON, J.

A. N. G. SUNDARARAJALU CHETTY
v.
THE KING

War Risks Goods Insurance Ordinance (IX of 1940*), S.* 7 (2)*–Repeal by Ordinance XXXIV of* 1945*—Prosecution after–Legality–General Clauses Act* (*X of* 1897*) S.* 6.

The repeal of S. 7 *War Risks Goods Insurance Ordinance,* 1940 *by Ordinance XXXIV of* 1945 *would not prevent the initiation and trial of offence against it while it was in force.*

If, after the expiry of the Act, a prosecution can be launched by the application of cls (d) and (e) of S. 6, *General Clauses Act, then the necessary pre-requisite (by way of a sanction) for such a prosecution must also be deemed to exist after the expiry of the Act.*

Petition under Ss. 435 and 439, Cr.P.C. 1898 praying the High Court to revise the order of the Court of Session, West Tanjore in C. A. No. 62 of 1947 (C. C. 154 of 1946, Additional I Class Magistrate, Kumbakonam).

R. Gopalaswami Aiyangar, for Petr.

N. T. Raghunathan for *Public Prosecutor*, for Crown.

ORDER

The point arising in this revision petition has already been the subject of a pronouncement by me in the decisions reported in the *Public Prosecutor* v. *Ramalingeswaraswamy* [1]; but Mr. R. Gopalaswami Aiyangar for the petitioner in his interesting and able argument has sought to question the correctness of that decision and out of deference to his learned arguments I shall state briefly the reasons why I adhere to the view already propounded by me in the case mentioned above.

The petitioner was convicted by the Additional First Class Magistrate of Kumbakonam of an offence under s. 7 (2) of the War Risks (Goods) Insurance Ordinance IX of 1940 and sentenced to a fine of Rs. 500. On appeal, the learned Sessions Judge of West Tanjore confirmed the conviction and sentence and this revision petition is a further attempt by the petitioner to canvass the correctness of his conviction and sentence. There is no dispute regarding the circumstances which led to the prosecution and as regards the fact that the petitioner did not not take out an insurance policy as contemplated by s. 7 (1) of the Ordinance. Various points were raised in the lower appellate Court of which, in addition to the question regarding the sustainability of the prosecution, the only other point that was argued was about the necessity of taking out an insurance policy for the entire goods belonging to the petitioner stored in various districts throughout India.

The prosecution in this case was initiated on 21–11–1946 as a result of a sanction obtained on 7–11–1946. Ordinance IX of 1940 continued to be in force till the duration of the war and six months thereafter, i. e., till the 30th September 1946, but portions of the same had been repealed by Ordinance XXXIV of 1945 dated 14th September 1945. This subsequent Ordinance repealed with effect, at and after

1. [1948] M. W. N. 684 : Cr. 152

midnight between the 30th September and the 1st October 1945, Ss. 5, 5-A, 7, 8 and 15 of the War Risks (Goods) Insurance Ordinance of 1940. Such being the case, from the date of the promulgation of the later Ordinance, S. 7 of the earlier Ordinance ceased to have any operation and was wholly effaced with the result that from that date the prohibition against carrying on any business in British India as a seller of goods which were insurable under the Ordinance and without taking out an insurance policy, was thereby revoked; but the offence in this case was committed prior to that date and if the prosecution had been started prior to the 1st October 1945, there could have been no question whatever about the maintainability of it.

The argument is now put forward that since the Ordinance of 1940 itself was a temporary piece of legislation which would automatically have expired at the end of the period contemplated by s. 72 of the Government of India Act, 1935, with all its later amendments, it cannot be said that the provisions of s. 6 of the General Clauses Act corresponding to s. 38 (2) of the English Interpretation Act can have any application here. By s. 30 of the General Clauses Act, an Ordinance is equated to a Central Act and therefore for the interpretation of the provisions of an Ordinance, the principles enunciated in the General Clauses Act will have to be applied. Mr. Gopalaswami Ayyangar invited my attention to the passage in Halsbury's Laws of England, Second Edition, Volume 31, pages 511 to 513. At pages 511 and 512, occur the following passage:—

> "Statutes, moreover, may be intended to be temporary as well as perpetual, and express words are not necessary to show whether Parliament intended a particular statute to be one or the other".

Again,

> "After the expiration of the statute, in the absence of provision to the contrary, no proceedings can be taken on it, and proceedings already commenced ipso facto determine..........A statute which is repealed differs from a temporary statute in that the former, except in so far as it relates to transactions already completed under it, becomes as if it had never existed, while with respect to the latter the extent of the restrictions imposed and the duration of the provisions are matters of construction".

In *Lemm* v. *Mitchell* [2] their Lordships of the Judicial Committee quote from the decision of Tindal, C.J. *in Kay* v. *Goodwin* [3] as follows:

> "I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

In *Bansgopal* v. *Emperor* [4] Sulaiman, C.J. delivering the judgment of the Full Bench has laid down that as a general rule, unless there is some special provision to the contrary after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect. An offence, therefore, committed against a temporary Act must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* terminate. It is further observed that even though the General Clauses Act would ordinarily apply to Ordinances under the Government of India Act, S. 6 of the Act is applicable only to a case where a previous Ordinance has been repealed by a subsequent Ordinance or a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires after the period during which it is in operation and therefore even though S. 30 makes the Act applicable to the Ordinances, S. 6 has no application to such temporary Ordinances. This decision has been followed by a single Judge of the Lahore High Court in *F.C. Aubrey* v. *K. M. Aubrey* [5].

On the other hand Mr. N. T. Raghunathan appearing for the Public Prosecutor contends that if S. 6 is not intended to apply to a temporary piece of legislation like an Ordinance, there was no necessity to insert S. 30 in the General Clauses Act at all. He further contends that the statement of the law contended for by Mr. Gopalaswami Aiyangar has not been accepted as one of absolute universal application because we find that in a very recent decision of the House of Lords reported in *Wicks* v. *Director of Public Prosecutions* [6] the unanimous opinions of the House of Lords was that under the Emergency Powers

2. [1912] A.C. 400 (406)
3. 6 Bing. 576
4. [1933] 55 All. 961
5. [1947] A.I.R. Lah. 414
6. [1947] A.C. 362

(Defence) Act, 1939, which by S. 11 cl. (3) provided that "the expiry of the Act shall not affect the operation thereof as respects things previously done or omitted to be done" and that although Regulation 2-A of the Defence (General) Regulations, 1939, made pursuant to the Act expired on the 24th February 1946, the trial of a person for an offence committed when the regulation was in force was proper and since S. 11 sub-sec. 3 did not expire with the rest of the Act, being designed to preserve the right to prosecute after the date of expiry, there was nothing wrong in proceeding with the prosecution after the expiry of the regulation. *Bennett* v. *Tatton* [7] was a case of a similar kind where, after the repeal of a certain temporary Regulation, offences committed against that Regulation were tried. It is also mentioned there that for the interpretation of such regulations S. 38(2) of the Interpretation Act is applicable. To the same effect is the view taken by this Court in *Chockalingam In re* [8]. It is noteworthy that such a point was not raised or discussed in similar cases arising out of temporary Acts and Ordinances for it is seen that the offences committed in the case reported in *Gas Plant Manufacturing Co. Ltd.* v. *Emperor* [9] decided by the Federal Court were also against the provisions of such temporary Acts or Ordinances which functioned only for a definite period of time. It is unnecessary for me to discuss the other aspects at great length because I have already stated in my judgment in *The Public Prosecutor* v. *Ramalingeswaraswamy* [1] that the repeal of S. 7 would not prevent the initiation and trial of offences against it while it was in force. But Mr. Gopalaswami Aiyangar contends that the retention of S. 12 of the Ordinance was necessitated not by the circumstance that future prosecutions were permissible, but by the fact that S. 10 had been allowed to continue and with the existence of S. 10, there is a necessity to continue S. 12. I am not inclined to accept this contention for S. 10, cls. (a) and (b) are necessary even after the repeal of S. 7 for the purpose of investigation of offences which were committed while S. 7 was inforce.

It is next urged that since the Ordinance worked itself out by the 30th September 1946, there was no authority competent to grant the sanction on 7-11-1946 to initiate the prosecution on 21—11—1946 and therefore the whole proceedings are without jurisdiction. For this purpose reliance is placed on the decision in *Monmohan Goswami* v. *Emperor* [10]. The answer to this contention is found in the fact that even if, after the expiry of the Act, a prosecution can be launched by the application of clauses (d) and (e) of s. 6 of the General Clauses Act, then the necessary pre-requisite for such a prosecution must also be deemed to exist after the expiry of the Act. That there was an authority competent to grant sanction under s. 12 of the Ordinance before its expiry is not disputed and it is the same authority that has now granted the sanction. I am therefore of opinion that this contention should also be overruled.

Lastly Mr. Gopalaswamy Aiyangar contended that since the value of the insurable goods exceeded Rs. 20,000 only in one district the criterion adopted by the lower courts in fixing the premium is wrong, and therefore the fine of Rs. 500 is excessive. I am inclined to hold that the prosecution initiated more than a year after the repeal of s. 7 does not require the imposition of a fine of Rs. 500. It is reduced to Rs. 100 which, if collected, will be credited to the War Risks (Goods) Insurance Fund. With this modification the revision petition is dismissed.

N.T.R. — *Petition dismissed*

7. [1918] 118 L.T. 788
8. [1945] M.W.N. 571 : Cr. 119
9. [1947] M.W.N. 393 : Cr. 85 F.C.
10. [1947] 48 Cr.L.J. 770

Cr. M. P. No. 43 of 1949
February 14, 1949
SATYANARAYANA RAO & RAJAGOPALAN JJ.
In the matter of N. R. SREENIVASAN, a detenu in the Central Jail at Vellore.

Maintenance of Public Order Act (Mad. Act I of 1947) S.2—Detention to prevent person getting out on bail—Malafide—Acting—Meaning of.

Petitioner was arrested and taken into judicial custody on 25–10–1947. He continued in such judicial custody till 21–3–48. Sometime before 21–3–48 he applied for release on bail which was granted. Meanwhile on 5–3–48 an order was passed by the district magistrate under S. 2 (1) (a) of Madras Act I of 1947. Grounds for detention dated 29–3–48 were furnished to the petitioner on 27–4–48. Additional grounds were furnished on 31–7–48. Shortly before 28–1–49 Government passed the requisite order under S. 3 (5) confirming the original order passed under S. 2 (1) (a) The affidavit filed on behalf of the counter petitioner sworn to by an inspector of police averred while in remand the petitioner applied for bail and the sessions judge ordered his bail on condition that he should report at the police station every day. As such the detenu was at liberty to furnish the necessary security and come out from jail. Hence an order for his detention was considered necessary." He was treated as a detenu from 21–3–48.

Held, *that the only reasonable construction the averments in the affidavit are capable of is that it was to prevent the release of the petitioner on bail, that his detention was considered necessary, which is not one of the grounds of satisfaction that S. 2 (1) of Mad. Act I of 1947 contemplates: that such an exercise of power is mala fide and the detention is illegal.*

The use of the word 'acting' in contradistinction with 'about to act' which should apply to acts in future, could only be interpreted to mean to relate to something done in the recent past (the recent past in relation to 5–3–48 the date of the order) and since the petitioner was in judicial custody from 25–10–47 the recent past was absent and could not have been considered by the District Magistrate.

Petition under S. 491, Cr.P.C. 1898 praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* for production before the High Court, Madras, the person of N. R. Sreenivasan a detenu in the Central Jail at Vellore to be dealt with according to law and direct that he be set at liberty.

M. S. Mani for Messrs Row & Reddy, for Petr.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER

[RAJAGOPALAN, J.]

The petitioner applies under S. 491 of the Code of Criminal Procedure for his release from detention. The petitioner was arrested and taken into judicial custody on 25—10—1947. He was charged in two cases with the commission of specific offences punishable under the Penal Code, namely, Ss. 147, 148, 323, 426 and 452 of the Indian Penal Code. He continued in such judicial custody apparently till 21—3—1948. Some time before 21—3—1948 he applied for release on bail with reference to those specific charges levelled against him under the Penal Code. Bail appears to have been granted by the Sessions Judge, but on what date it was granted we have not been told. Meanwhile, on 5—3—1948, an order was passed by the District Magistrate of Coimbatore under S. 2 (1) (a) of Madras Act I of 1947. The order ran:—

> "Whereas I . . am satisfied that with respect of N. R. Srinivasan . . that he is acting in a manner prejudicial to the public safety and with a view to preventing him from so doing it is necessary to detain him, I hereby direct that the said N. R. Srinivasan shall be arrested by the police wherever found and removed to the Central Jail, Vellore."

That order was passed on 5—3—1948. From the affidavit filed on behalf of the counter-petitioners it is found that it was only from 21—3—1948 that the petitioner was treated as a person detained under the provisions of Madras Act I of 1947. Grounds for detention dated 29—3—1948 were furnished to the petitioner on 27—4—1948. Additional grounds were furnished on 31–7–1948. It would appear that shortly before 28—1—1949 the Government passed the requisite order under S. 3(5) of the Act confirming the original order passed under S. 2(1)(a) of the Act.

The main contention of the learned advocate for the petitioner is that the detention of the petitioner under the provisions of Madras Act I of 1947 is *mala fide*. In *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1]

1. [1948] M.W.N. 853 : Cr. 193 F.B.

the learned Chief Justice laid down four categories in which classes of cases alone it will be open to the Court to intervene in an application filed under S. 491 of the Code of Criminal Procedure with reference to orders passed under Act I of 1947, (a) when the order is not duly authenticated, (b) when the person detained in pursuance of the order is not the person intended to be detained, (c) when there is lack of *bona fides*, and (d) when it is established that the essential requirement of section 2, namely, the satisfaction is not present. We are concerned only with (c). In the affidavit filed on behalf of the counter-petitioners, sworn to by an Inspector of Police it was averred:—

> "While in remand, he (the petitioner) applied for bail and the sessions judge, Coimbatore ordered his bail on condition that he should report at the police station every day. As such the detenu was at liberty to furnish the necessary securities and come out from the jail. Hence an order for his detention was considered necessary. He was treated as a detenu from 21st March 1948."

No doubt, the affidavit also discloses the fact that the charges against the petitioner were withdrawn, but that in no way affects the legality of the order of detention. In our opinion, the only reasonable construction the averments in the affidavit are capable of is that it was to prevent the release of the petitioner on bail that his detention was considered necessary. That clearly is not one of the grounds of satisfaction S. 2(1) of Madras Act I of 1947 contemplates. No doubt under clause (d) of the four classes postulated by the learned Chief Justice, the fact that the District Magistrate, the detaining authority, was satisfied under s. 2(1) of the Act is a fact that can be gathered from the order of detention itself, and further beyond that, it may not be permissible to go. But in considering the question whether the apparent satisfaction recorded by the District Magistrate was in good faith in exercise of the statutory powers conferred upon him, it is certainly permissible to view the order of detention in relation to the apparent and avowed object with which that order of detention was passed, i.e., not to prevent a breach of the peace or a danger to public safety but to prevent the petitioner from coming out of jail if he could find the sureties he was required to do by the Sessions Judge. Such an exercise of power, we are convinced, was *mala fide*; and where a detention is traceable only to such an exercise of power *mala fide*, the detention must be held to be illegal.

There is one other point to be mentioned. What the District Magistrate said was that the petitioner was *acting* in a manner prejudicial to the public safety and that with a view to prevent him from so doing, it was necessary to detain him. Now that order was passed on 5—3—1948. The petitioner, it must be remembered, was in custody from 25—10—1947. Under S. 2 (1) (a) even a satisfaction that a person was *about to act* in a manner prejudicial to public safety would have been sufficient to justify an order of detention; but when the magistrate purports to have been satisfied that the petitioner was acting in a manner prejudicial to public safety, we cannot import into that order that the District Magistrate meant to say that the petitioner was about to act in a manner prejudicial to public safety. The use of the word "acting" in contradistinction with "about to act", which should apply to acts in future, could only be interpreted to mean to relate to something done in the recent past if not in the immediate present i. e. the recent past in relation to 5—3—1948, the date of the order. Since the petitioner was in judicial custody from 25—10—1947, that recent past was absent and could not have been considered by the District Magistrate. We are not concerned now whether that was a sufficient reason for the District Magistrate to be satisfied; but we are only on the question whether such an exercise of power was in good faith or in bad faith. As we have already pointed out, the materials placed before us clearly indicate that it was not in the exercise of good faith that the order of detention was passed on 5—3—1948.

We allow the petition and direct that the petitioner be set at liberty unless he is detained for a valid reason.

N.T.R. — *Petition allowed*

Cr. R. C. No. 1325 of 1947.
Cr. R. P. No. 1204 of 1947.
October 28, 1948.
GOVINDA MENON, J.

AKKIRAJU SANYASI
v.
THE KING

Penal Code (XLV of 1860*), S.* 498—*Takes—Meaning of.*

The word 'entice' in S. 498 connotes that some kind of persuasion or allurement was held out by the person who imposed either his will or power upon a woman. But the wording of the section makes it clear that in order that a person should be made liable for an offence under that section it is not necessary that there should be any enticement. All that is required is that if any person 'takes away' another man's wife with the intent that she may have illicit intercourse with him, then the offence is complete. The fact that the word 'takes' is put in juxtaposition with 'enticing away' shows that the legislature intended that the circumstances attending the two are quite different.

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Vizagapatam dated 11—9—1947 in Cr. App. No. 45 of 1947 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Anakapalli dated 12-7-1947 in C. C. No. 336 of 1947.

E. Venkatesam, for Petr.

S. Ramamurthy, for complainant.

Public Prosecutor (V. L. Ethiraj) for Crown.

JUDGMENT

The petitioner was convicted by the Stationary Sub Magistrate of Anakapalli of an offence under S. 498 I. P. C. and sentenced to rigorous imprisonment for three months. The conviction was upheld in appeal by the Sub-Divisional Magistrate of Vizagapatam, who reduced the sentence to a fine of Rs. 200 out of which a sum of Rs. 100 was ordered to be paid to the complainant as compensation.

Mr. Venkatesam appearing for the petitioner has raised two points in support of his application. The first of them is that from the evidence it can be discerned that the wife of the complainant who, it is alleged, had been taken away or enticed by the petitioner, had already been discarded by the complainant some time ago, and therefore if she had gone and lived with the petitioner as his wife either as a result of inducement or request made by the petitioner of her own free will and volition which were aided by the petitioner, it cannot be said that an offence under S. 498 has been committed. In support of this contention reference was made to the evidence of P. W. 6 who in cross-examination says that the complainant abandoned his wife and went away to another village for two years. From this statement it is sought to be argued that at the time of the alleged enticement or taking away the woman was not under the protection of the complainant at all and that therefore the element necessary to constitute an offence under s. 498 is absent. From the evidence of P. Ws. 1, 2 and 3 and others it is clear that the alleged enticement or taking away took place only three months before the complaint, but according to the evidence of P. W. 6 the abandonment and going away were two years ago. P. Ws. 1 to 3 as well as other witnesses including P. Ws. 8 and 9 say that at the time the petitioner and the woman went from their village the woman was under the protection of the husband. There is some evidence also that she was living with her father. This portion of the evidence has been accepted by the lower court, and I can find no justification for holding that at the time the woman left her village she was not under the protection of the complainant. It seems to me that the findings of fact on this aspect of the case have to be accepted, especially since nothing can be said against the evidence of those witnesses. I therefore find it difficult to accept the contention raised by the learned counsel that the woman had been abandoned by the complainant.

The other question which has been rather elaborately argued at the Bar is whether the elements constituting an offence under s. 498 can be held to be present in the present case. It is conceded both by the learned Public Prosecutor and by the learned counsel appearing for the complainant that from the evidence it cannot be said that there was any case of enticement in the strict sense of the term. The word "enticement" necessarily connotes that some kind of persuasion or allurement was held out by the person who imposed either his will or power upon a woman. There is no evidence whatever that the petitioner was seen offering any inducement; nor is it suggested that the petitioner placed before the woman any false impression of his status or what he would do to benefit her. In these circumstances, if the matter has stood then it would be very difficult to confirm the conviction of the petitioner.

But then, the wording of the section makes it clear that in order that a person should be made liable for an offence under that section it is not necessary that there should be any enticement. All that is required is that if any person "takes away" another man's wife with the intent that she may have illicit intercourse with him, then the offence is completed. What then is the meaning of the word 'takes'?

The fact that the word "takes" away is put in juxtaposition with "enticing away" shows that the legislature intended that the circumstances attending the two are quite different. In *Hossaini Methor* v. *Emperor* [1] Henderson and Biswas, JJ. had to consider the meaning of this term. Biswas, J. was of the view that there must be some influence operating on the woman, or co-operating with her inclination at the time the final step was taken which caused a severance of the woman from her husband, for the purpose of causing such step to be taken. On the facts of that particular case it was held that there was no taking away. This decision was followed in *Mahadeo Rama* v. *Emperor* [2] by Beaumont, C. J. sitting with Sen, J. The learned Chief Justice agreed with the view taken by Biswas, J. and came to the same conclusion.

Having carefully read both these cases it seems to me that the facts in those cases are very different from what are contained in the present case. I do not think that from the evidence of the witnesses it is possible to infer that the woman went with the petitioner out of her own will and not as a result of any act done by the petitioner. There is a clear finding of fact by the lower courts, accepting the evidence of the various witnesses, that the woman went away from a place where she had gone to gather firewood after petitioner had gone there and spoken to her. In the very nature of things it is not possible to say what exactly were the words which the petitioner used towards the woman; but from the attendant circumstances and the previous attitude taken by the petitioner as well as his subsequent conduct the lower courts were perfectly justified in inferring that the petitioner took away the woman with him. The circumstance is made clearer by the fact that though the parties belonged to a village in Vizagapatam District the petitioner and the woman were seen, three months later, in a village in the West Godavari District, and, as the lower appellate court finds, she was with him living in a distant place even at the time when this petition was filed. From these facts the only inference to my mind that can be drawn is that it was as a result of some action taken by the petitioner that the woman went with him.

My attention was invited by Mr. Venkatesam to a decision in *Ram Narayan* v. *Emperor* [3]. Having carefully perused that decision I do not find that the principles enunciated there can be applicable to this case in any way. Moreover in that case Broomfield, J. was of the view that the complaint itself was not a proper one. There were other matters on which the Bombay High Court came to the conclusion that the petitioner there neither took away the woman nor enticed her. I do not think that that decision is any authority for holding that in circumstances like the present case no offence is committed.

Before leaving this case I must take exception to a passage in the judgment of the lower appellate Court in the following terms:-

> "The ties of matrimonial alliance in some of the lower strata of the community to which the parties belong are not very strictly observed......"

I am constrained to observe that this sentence is absolutely unwarranted. The ties of matrimonial alliance are strictly observed as much in the lower strata of society as in high placed and fashionable society. The learned Magistrate was certainly not justified in making such a wide observation.

In the circumstances of the case and considering the fact that the complainant himself was to some extent responsible for the way in which the woman behaved I do not think that a fine of Rs. 200 is called for. I reduce the fine to Rs. 50 and cancel the amount of compensation ordered to be paid to the complainant.

N.T.R.

—

1. [1937] A.I.R. Cal. 466
2. [1943] A.I.R. Bom. 179
3. [1937] I.L.R. Bom. 244

Cr. App. No. 347 of 1948
November 26, 1948
SOMASUNDARAM, J.

THE PUBLIC PROSECUTOR
v.
R. DESIGAN

Cr. P. C. (V of 1898*), S.* 414—*Offence under Central Act XXIV of* 1946 *tried summarily—Appeal.*

An offence under the Rationing Order was tried summarily on an application made under S. 12 *of Central Act XXIV of* 1946; *and a fine of Rs.* 100 *was imposed.*

Held, *no appeal lay against the sentence.*

The bar under S. 414 *Cr.P.C. applies not only to cases of conviction of offences mentioned in S.* 260 *Cr.P.C. but also to offences under a special Act which empowers a magistrate to act under S.* 260.

Appeal under s. 417, Cr.P.C. 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sessions Judge of Ramnad at Madura in Cr.App. No. 160 of 1947 on his file (preferred against the judgment passed on the accused in C.C. No. 275 of 1947 on the file of the Additional First Class Magistrate of Devakottai.)

Public Prosecutor (V. L. Ethiraj), for Applt.

G. N. Chari, for Respt.

JUDGMENT

The accused in this case was convicted by the Additional First Class Magistrate of Devakottai in C. C. No. 275 of 1947 and sentenced to a fine of Rs. 100 for an offence under cl. 4 (2) of the Madras Rationing Preparatory Measures Order, 1945 and regulation 14 of the regulations framed under cl. 12 of the Madras Rationing Order 1945 and under r. 81 (2) of the Defence of India Rules read with s. 7 (1) of Act XXIV of 1946. The accused preferred an appeal to the Sessions Judge of Ramnad who acquitted him. The Public Prosecutor has preferred this appeal against the order of the acquittal.

The main ground on which the order of acquittal is attacked is that under s. 414 Cr. P. C. no appeal lies against this judgment of the First Class Magistrate as the case was tried summarily under s. 260 Cr. P. C. That section mentions what offences and classes of offences may be tried summarily under that section. It does not in terms provide for the trial of offences under the Rationing Order; but s. 12 of Act XXIV of 1946 says:

> "Any magistrate or bench of magistrates empowered for the time being to try in a summary way the offences specified in sub-sec. (1) of s. 260 of the Cr. P. C., 1898, may on application in this behalf being made by the prosecution try in accordance with the provisions contained in ss. 262 to 265 of the said Code any offence punishable under this Act."

It is not disputed in this case that this case was tried summarily on an application made in this behalf by the prosecution. The Magistrate was therefore well within his power in trying this case summarily under s. 260 Cr.P.C. Under s. 414 Cr.P.C. no appeal lies against a sentence of Rs. 100 when an accused is convicted summarily under s. 260.

It is contended by the learned counsel for the accused that s. 414 applies only to cases of conviction of offences mentioned in s. 260 and not for offences under a special Act as in this case. S. 414 Cr. P. C. runs as follows:

> "Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under s. 260 passes a sentence of fine not exceeding two hundred rupees only".

The words "in which a Magistrate empowered to act" indicate that the section applies not only to cases in which the Magistrate has got power to act under s. 260 for the offence mentioned in the section but also where he is otherwise empowered to act under that section. The words "empowered to act" refer not merely to implied power contained in s. 260 but also refer to express powers conferred on the Magistrate by other provisions in other enactments. No appeal therefore lies against the sentence of Rs. 100 to the Sessions Judge and the appeal was therefore incompetent. The order of the appellate court is set aside. This does not in any way prevent the accused from filing a revision to this court under ss. 435 and 439 Cr. P. C.

N.T.R. —

Cr. App. No. 568 of 1948
January 18, 1949

SUBBA RAO & PANCHAPAKESA AYYAR, JJ.

Madda Peda BRAHMAYYA alias Satyanandam
v.
THE KING

Evidence Act (I of 1872), s. 24—Confession—Retracted—Conviction.

A conviction can be based on a retracted confession without corroboration if the reasons given by the accused for witharawing the confession are palpably false and the court is satisfied that the confession is voluntary and represented the true state of facts.

Appeal against the order of the court of Session of the East Godavari division at Rajahmundry in C. C. No. 36 of 1948 passed on 25—8—1948.

A. Varadarajan, amicus curiae, for Applt.

Crown Prosecutor for Public Prosecutor, for Crown.

JUDGMENT.

[SUBBA RAO, J.]

The accused was convicted under s. 302 of the Indian Penal Code and has been sentenced to transportation for life. The accused and P. W. 7 are husband and wife, P. W. 7 being

his third wife. The husband and wife lived together happily and had a number of children. One Narayanamurthi (the deceased) was a neighbour of the accused, and it is in evidence that he led wayward life. Somehow he was able to seduce P. W. 7 and there is evidence that there was illicit intimacy between P. W. 7 and the deceased Narayanamurthi. The husband discovered her in a compromising position twice, and on the second occasion as the accused threatened to put an end to their lives, the wife left the husband for her parent's house. On the morning of the 30th March 1948 Narayanamurthi was found dead in his house, and the prosecution case is that he was murdered by the accused. That there was sufficient motive for the accused to commit the murder admits of no doubt. P.W. 7, Seethamma, the wife of the accused, admits in her evidence that she had illicit intimacy with Narayanamurthi and that she was discovered twice in a compromising position. There is also other evidence to that effect.

The more difficult question is whether the accused was the person who stabbed Narayanamurthi. There is no direct evidence in the case. The only important document on which the lower court convicted the accused is the confession made by him before the Magistrate, Exhibit P. 16 in the case. In this the accused gave in a detailed manner the reason for the crime and the circumstances under which and the manner in which the offence was committed. Before the Sessions court, when the Sessions Judge put him a direct question with reference to the confession made by him, he only stated, "I know nothing. I cannot see after sunset. I sleep in the field". It will therefore be seen that the accused did not give any reason why he made a confession before the Magistrate. The learned counsel appearing for him contended that the confession was not voluntary and therefore should not be relied upon. He argued that the fact that the confession contained so many details and so many facts corroborating the evidence in the case indicated that it could not have been a voluntary one. The elaborate manner in which the confession was made may well have been due to the fact that the accused, in a penitent mood, intended to make a clean breast of all the facts known to him. The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage does not necessarily show that the confession was not voluntary.

It was next contended that we should not act upon a retracted confession without corroboration on material particulars. As a question of law this argument is not sound, at least so far as our High Court is concerned. It has been held in a number of cases, the latest being *In re Rajagopal* [1] that a conviction can be based on a retracted confession without corroboration if the reasons given by the accused for withdrawing the confession are palpably false. Ordinarily we should expect corroborative evidence of a retracted confession. Though it is not a rule of law, as a rule of prudence it is generally unsafe to convict a person on a retracted confession alone. This statement of law is concisely and accurately stated in *Suker Dusadh* v. *Emperor* [2] at page 306 :

> "As far back as in *Queen* v. *Jhurree* [3] it was held that a voluntary and genuine confession is legal and sufficient proof of guilt and this decision has never been overruled though it has sometimes been said that the rule of prudence is in favour of seeking corrobation of a confession which has been retracted."

But in this case we are satisfied that the confession was voluntary and represented the true state of facts. Indeed the accused did not even give any reasons why he made the confession which he later on retracted. He did not give, for the obvious reason that the confession was voluntary.

We therefore accept the confession made by the accused in the lower court and hold that the learned Sessions Judge had rightly convicted him. The appeal is dismissed.

N.T.R. — *Appeal dismissed*

Cr. App. No. 348 of 1948

November 26, 1948

RAJAGOPALAN, J

THE PUBLIC PROSECUTOR

v.

Sannidhi SRIRANGANAYAKULU

Prevention of Adulteration Act (Mad. Act III of

1. [1943] M.W.N. 793 : CR. 181: I.L.R. 1944 Mad. 308
2. [1941] A.I.R. Pat 303
3. 7 W.R. CR. 41

1918), s. 5 (1) (b)—*Honey—Standard of purity not prescribed—Adulteration—Offence.*

In the absence of rules prescribing the standard of purity for honey of an absolute purity has to be sold, unless what was sold or offered for sale was represented to be not honey but honey with an admixture.

Where the honey sold was found to contain 36 percent of cane sugar, the vendor is guilty of an offence under s. 5 (1) (b) Prevention of Adulteration Act and he could not claim the benefit of proviso (iii) to s. 5 (1).

Appeal under s. 417, Cr. P. C. 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sub-Divisional First Class Magistrate of Bheemavaram in C. A. No. 36 of 1947 on his file preferred against the order of the court of the Stationary Sub-Magistrate of Bheemavaram and made in C. S. Nos. 173 and 310 of 1947.

Public Prosecutor, (V. L. Ethiraj) for Applt.

Kasturi Sivaprasada Row, for Respt.

JUDGMENT.

The charge against the accused was that he contravened the provisions of s. 5 (1) (b) of the Prevention of Adulteratian Act, Act III of 1918, and thereby rendered himself liable to be punished under s. 5 (1) (d) of that Act.

P. W. 1 was the Sanitary Inspector of Akkiveedu. When he called at the shop of the accused, P. W. 1 found the accused selling honey to P. W. 2. After the honey had been handed over to P. W. 2, P. W. 1 in his turn asked for some honey to be sold to him as a sample. The accused refused to sell any honey to P. W. 1. P. W. 2 had not in the meanwhile, paid for the honey that had been sold to him. P. W. 1 obtained that honey and when it was analysed it was found to contain 36 per cent of cane sugar.

The learned Sub-Magistrate convicted the accused under s. 5 (1) (d) of the Act and sentenced him to pay a fine of Rs. 25. On appeal, the learned Sub-Divisional Magistrate set aside the conviction and acquitted the accused. The learned magistrate held that the transfer of honey to P. W. 2 did not constitute a sale. Of course, unless there was a sale to P. W. 2, the accused would not come within the scope of s. 5 (1) (b) or 5 (1) (d) as the case was laid against him. The learned Sub-Divisional Magistrate, however, appears to have taken an erroneous view of what constituted a sale. It was not the specific case of the accused at any stage that it was as a gift that he handed over the honey to P.W. 2. The accused denied that there had been any transfer of honey from him to P.W. 2. The evidence on record could leave one in no doubt on the question, that the accused did deliver honey to P.W. 2 who had come to the shop to buy that honey. That the purchase price was not paid before P.W. 2 left the shop did not make it any the less a sale, though the liability of P. W. 2 to pay the purchase price remained. P. W. 2 admitted that he had not paid the money, but that in no way affected the nature of the transaction which was a sale. Besides even the offer for sale is punishable under S. 5 (1) (b). Certainly when the accused handed over the honey to P.W, 2 it was in the least an offer for sale.

The learned advocate for the accused contended that no rules had been prescribed under S. 20 (1) (e) by the Government. If no such rules were framed, the only reasonable inference could be that honey of an absolute purity had to be sold, unless what was sold or offered to be sold was represented to the purchaser to be not honey, but honey with an admixture of cane sugar. P.W. 2 asked for honey and it was honey as such that the accused was bound to supply. The absence of rules in no way affects the liability of the accused for punishment under S. 5 (1) (d).

The proviso to S. 5 (1) cannot apply either. Cane sugar might be innocuous material but 36 per cent of it did certainly increase the bulk, weight, or measure of the honey within the meaning of the proviso to S. 5 (1), and from the circumstances of this case the fraudulent intention of the accused should be obvious.

The order of acquittal is set aside. The accused will be convicted under S. 5 (1) (d) read with S. 5 (1) (b) of Madras Act III of 1918 and he will be sentenced to pay a fine of Rs. 25, the fine orignally imposed by the learned Sub Magistrate. The accused is a first offender. All the same the fine was by no means excessive. In default of payment of fine, the accused will undergo simple imprisonment for ten days. Time for payment of fine–15 days from the date of the receipt of records in the lower Court.

N.T.R. — *Appeal allowed*

Cr. R. C. No. 226 of 1948.
Cr. R. P. No. 209 of 1948.
November 26, 1948.
RAJAGOPALAN, J.

VANKA BHIMARAJU
v.
THE KING

Prevention of Adulteration Act (Mad. Act III of 1918), s. 20 (2) (f) & R. 27A—Scope of rule.

R. 27-A is not inconsistent with the provisions of s. 20 (2) (f) Prevention of Adulteration Act. It is not necessary that that rule should be applied only to food offered for sale for consumption as food.

Where the accused kept a composition of gingelly oil and groundnut oil he would be guilty of a contravention of R. 27A, even if that composition was kept by him for sale not as food but as lamp oil.

Petition under Ss. 435 and 439, Cr. P.C. 1898 praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Guntur in C.A. No. 128 of 1947 preferred against the judgment of the Court of the Stationary Sub Magistrate, Guntur in C. C. No. 3231 of 1947.

N. Subramanyam for Petr.
Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

The petitioner was convicted under R. 29 for contravention of R. 27A of the Rules framed under S. 20 (2) (f) of the Madras Prevention of Adulteration Act. He was sentenced to a fine of Rs. 100.

The accused did not deny that the oil which was found in his possession contained 50 per cent of gingelly oil and 50 per cent of groundnut oil. The accused pleaded from the commencement that he kept that oil not for sale as food but for sale as lamp oil. The learned trial magistrate apparently did not accept that defence. The learned Sub Divisional Magistrate on appeal held that even if that composition was kept by the accused for sale as lamp oil that was in contravention of R. 27 (a).

Assuming for the purpose of this case that the defence was true and the composition was kept by the accused for sale as lamp oil, *The Public Prosecutor* v. *Kachi Mohideen Marakkayar* [1] should really conclude the question at issue of the liability of the accused for punishment under R. 29. Yahya Ali, J. observed:

"The prohibition is absolute for whatever purpose the consumer may take it or the seller may sell it."

What R. 27-A states is "No person shall sell or have in his possession for the purpose of sale a mixture of gingelly oil with groundnut oil." To reiterate that the accused kept the composition for sale was common ground. Only his contention was that he did not keep it for sale as food.

No doubt Yahya Ali, J. did not specifically consider the question whether R. 27 (a) was *ultra vires* the Provincial Government. S. 20 (2) (f) runs:

"In particular and without prejudice to the generality of the foregoing power the local Government may make rules prohibiting or regulating in the interests of public health

(1) the addition of water or other dilutent or adulterant to any food......"

I am unable to see anything in R. 27-A inconsistent with the provisions of R. 20(2) (f) (i) of the Act. There was nothing in R. 20 (2) (f) requiring the Government to restrict its rule making power to food offered for sale for consumption as food. The learned advocate for the petitioner pointed out that the preamble recited that the Act was designed in the interests of public health to prevent adulteration of food. Had the preamble run that it was designed to prevent adulteration of food offered for sale for consumption as food there might have been some substance in the contention, that R. 27-A which has much larger scope, was beyond the scope of the rule making powers conferred on Government by statute. Though Yahya Ali J. did not go specifically into the question whether R. 27-A was *ultra vires* or *intra vires* the reasoning there made it quite clear that the rule was perfectly *intra vires*. It was not necessary that that rule should be applied only to food offered for sale for consumption as food. As the learned Judge pointed out the rule was absolute in its scope and that scope was well within the rule making power by s. 20 (2) (f).

The sentence of fine of Rs. 100 for a second offence was by no means excessive. The petition is dismissed.

N.T.R. — *Petition dismissed*

1. [1948] M.W.N. 59(1): Cr. 11(1)

PRIVY COUNCIL

June 2, 1948

LORD SIMONDS, LORD NORMAND, LORD OAKSEY LORD MAC DERMOTT & SIR MADHAVAN NAIR

A. J. E. G. CASPERSZ

v.

THE KING

Penal Code (*XLV of* 1860) *S.* 409—*Ceylon Penal Code, S.* 392—*Offence under.*

Certain sums were by the appellant's authority paid out of the public funds entrusted to the appellant to overseers in respect of certain work which to the appellant's knowledge had not been done, the appellant's only motive being to assist the overseers in their inconveniences and losses and do the work quickly. There was no collusion between the appellant and the overseers and the appellant did not take the money himself.

Held *that the appellant was guilty under S.* 392 *Ceylon Penal Code* (*S.* 409 *Indian Penal Code*) *as the appellant intended to cause wrongful gain to the overseers and wrongful loss to the government within the meaning of the Penal Code.*

The fact that the appellant may have thought that he was acting in the interests of the country in getting the work done and did not take the money himself can be taken into account in reducing the sentence.

L. M. D. Desilva K. C. & R. K. Handoo, for Applt.

Sir David Maxwell Fyfe, K. C. & Frank Gahan, for Respt.

JUDGMENT.

Lord Oakesy:—This is an appeal from a judgment of the Supreme Court of Ceylon dated March 7, 1946, which affirmed the conviction of the appellant by the District Court of Trincomalie on November 13, 1945, but substituted for a sentence of six months' rigorous imprisonment, a fine of Rs. 500 and imprisonment till rising of the Court. The appellant paid the fine and served the sentence of imprisonment.

At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal should be dismissed, and they now state their reasons.

The charge against the appellant was that between April 10 and May 19, 1944, he, being entrusted as executive engineer at Trincomalie of the Public Work Department with money to pay overseers for rubble bottoming on specified parts of the Trincomalie—Batticaloa road, committed a criminal breach of trust in respect of Rs. 6,218,48 out of such money.

The charge was under s. 392 of the Penal Code and the following sections of the Code are material :—

21—(1) "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

(2) "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

22. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly".

388. Whoever, being in any manner entrusted with property, or with any dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust or *wilfully suffers* any other person so to do, commits "criminal breach of trust."

Illustrations.

(c) A, residing in Colombo, is agent for Z, residing in England. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits 10,000 rupees to A, with directions to A to invest the same on mortgage of coffee estates. A dishonestly disobeys the directions; and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in a company, disobeys Z's directions and buys shares in a company in Z's name instead of investing the money on mortgage, here, though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly has not committed criminal breach of trust.

392. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits breach of trust in respect of that property, shall be punished with imprisonment of either description

for term which may extend to ten years, and shall also be liable to fine."

The evidence for the prosecution established the following facts :—

In January, 1944, the appellant, as the executive engineer at Trincomalie was put in charge of the work on a three-mile stretch of the Trincomalie—Batticaloe road, a narrow existing road which had to be improved as part of a plan for improving the China Bay road. For military reason the work was of great urgency, and speed was more important than cost. For these reasons the work was started in January, 1944, before the usual estimate was drawn up and approved. On February 11, 1944, the appellant submitted an estimate for the work, and was notified on February 26 that the estimate was approved. The estimate provided for an expenditure of Rs. 16,228,84 on rubble bottom. The method by which such work was done was as follows: overseers, who were registred government servants with pension rights, employed the necessary labourers who were paid at rates approved by the government. Periodically the overseer prepared a bill for the work done by labourers employed by him. The measurements and amounts were checked by the executive engineer and if necessary the bill was corrected. A voucher was then prepared in the office and certified as correct. The head clerk and engineer then signed a cheque which was paid to the overseer. At the time of the work in question there was an acute and increasing shortage of labour in Ceylon especially in Trincomalie, and threats were used to force overseers to bring labourers to Trincomalie for the work. At the instance of the appellant a 100 per cent, increase in rates was sanctioned by the Government, but nevertheless the shortage persisted. The overseers doing the work were from the commencement grumbling that they were losing because, so they said, they were paying their labourers more then they were getting from the Public Works Department. Complaints were made to the appellant, who procured the overseers to insert items in their bills for rubble bottom, although in fact no rubble bottoming was done

On various dates from April 6, 1944, to May 18, 1944, the overseers submitted ten bills in which claims were made in respect of rubble bottom. Each bill was supported by a form attached thereto purporting to show the measurements of the work. In seven of the bills so submitted the quantity of rubble bottom was altered, indicating that the measurements had been checked by the executive engineer. The measurement forms were correspondingly altered. In the other three bills (as also in some of the seven bills) there were alterations not realting to rubble bottom. Most of the alterations were made by the appellant but some were made by a young engineer, H.K. Melsom, who was on probation, and in March, 1944, had been sent to study the work under the appellant. Melsom knew that no rubble bottom was laid, and when for the first time he saw a bill with a claim for rubble bottom he mentioned to the appellant that no rubble bottoming had been done. The appellant, however, instructed him to reduce the quantities and to pay, as the rates were low and as the overseers had to overcome their difficulties. Later Melsom refused to certify bills with items for rubble bottom, but the appellant then showed him a letter from the Minister saying that the cost of the work on the roads was of secondary importance. Sums amounting in all to Rs. 6,218,48 were by the appellant's authority paid out of the public funds entrusted to the appellant to overseers in respect of rubble bottom which to the appellant's knowledge had not been laid.

Acting on information the superintending engineer made investigations in May, 1944, and the appellant, on being questioned, took full responsibility. He asked for advice, and the superintending engineer advised him to recall the money paid for rubble bottom and to credit the revenue. The appellant then demanded repayment from the five overseers who had received payments for rubble bottom. Three of them refunded to the appellant the amounts received, but two refused to do so. The appellant, however, paid to the credit of the government Rs. 6,22,403 expressed to be recovered on account of overpayments and the appellant caused the chief clerk to make out receipts which purported to show repayments from each of the five overseers. The Director of Public Works received from the superintending engineer a report on the irregular payments, and on July 13, 1944, the Director of Public Works read this report to the appellant and recorded the appellant's answers to questions based on the report. The record was signed by the appellant. The report stated that the appellant admitted that he was solely responsible for the payments to the overseers for foundation work which had not been done, the appellant's only motive being to assist the overseers in their inconveniences and losses. The appellant stated to the Director of Public Works that his reasons for making payments

for work not done were that he had been instructed to get the work done as quickly as possible by paying anything and anyhow so long as it was reasonable; that the overseers did not cover their costs, and so when they appealed to the appellant for permission to charge this item, the appellant gave permission that the appellant's sole purpose was to get the work done, and in that he succeded until relieved of the work; and that there was no collusion between the appellant and the overseers. The Director of Public Works did not consider that the appellant took the money himself, and the appellant was not suspended or prosecuted until late in 1944.

The appellant did not give evidence, except after conviction in mitigation of sentence.

The learned Judge of the District Court convicted the appellant. In his judgment he set out the facts and stated that the defence relied on the statements of the appellent and the evidence of the overseers to show that the appellant had no dishonest intentions. One view of the alterations in the measurement forms was that the appellant thought that the overseers were charging too much as losses, while another view was that the appellant was impressing the head office and the audit with the genuineness of the rubble bottom items. There was no evidence that the amount of the losses was agreed, and no method was mentioned of how the losses were assessed. Accordingly, the learned judge felt constrained to hold that the alterations were to show that the items were genuine, especially as there was no relationship between the alleged losses and the amounts expended. He left forced to come to the conclusion that the appellant had criminally misappropriated funds entrusted to him as a public servant.

The reasons of the Supreme Court for affirming the conviction were given by Mr. Justice Cannon, who pointed out that the appellant did not contest the irregular payments but relied on the explanation given to the superintending engineer, and on the urgency of the work. Mr. Justice Cannon interpreted the word "misappropriated", used by the District Judge, as "misapplied", and went on to consider the meaning of "dishonest" which in the Penal Code appeared to him to have nothing to do with probity. He thought that there could be no doubt that the appellant knew quite well that he was causing wrongful gain to the overseers and wrongful loss to the government, and that the evidence of the government's attitude towards cost must have indicated to the appellant that requests for necessary increases would have been dealt with, quickly and sympathetically. Other evidence in the learned Judge's opinion confirmed the view that the appellant was not acting bona fide. Accordingly the conviction was confirmed but the sentence reduced.

Before their Lordships' Board Mr. de Silva in an able argument for the appellant contended that the appellant was not guilty of a criminal breach of trust within the meaning of the Penal Code. He relied upon the illustrations to s. 388 and contended that the evidence for the prosecution showed that the appellant did not intend to cause wrongful gain to the overseers or wrongful loss to the government and that though the falsification of the bills and forms might be considered unlawful means within s. 21, yet the overseers were legally entitled within that section to be indemnified by the Government for the losses they had sustained in paying their workmen. He further contended that the onus of proving that the appellant knew that the overseers were not legally entitled to the money paid them by him rested upon the prosecution and had not been discharged and that the deception practised by the appellant was not sufficient to prove dishonesty since deception may honestly be employed to achieve lawful and desirable ends.

Their Lordships are unable to accept these arguments. In their opinion there was unchallenged evidence to show that the appellant intended to cause wrongful gain to the overseers and wrongful loss to the government within the meaning of the Code. The means adopted by the appellant were undoubtedly unlawful and in their Lordships' opinion there was no evidence that the overseers were legally entitled to be indemnified by the government for their alleged losses. It is true that the prosecution called some of the overseers who stated that they had made losses but no evidence was given that their contracts with the government either expressly or impliedly provided for indemnification from loss. The argument that the overseers were legally entitled to indemnify themselves against loss by putting forward false accounts in order to obtain payment for work which they had not done cannot be entertained.

The fact that the appellant may have thought that he was acting in the interests of the country in getting the work done has been properly taken into account by the Supreme Court of Ceylon in reducing the sentence.

It was not suggested before their Lordships that the appellant had suffered from the fact

that the Judge who committed him sat on the Bench with the Judge who tried him but their Lordships agree with the Supreme Court that such a practice is undesirable.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be dismissed.

PRIVY COUNCIL

July 28, 1948

LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON & LORD MAC DERMOTT.

WALLI MOHAMMAD & another
v.
THE KING

Evidence Act (*I of* 1872) *S.* 30—*Statement of co accused—Use of—Proof of offence.*

No doubt it is legitimate for a judge to point out to a jury or to the assessors and himself to take into consideration the fact that the prisoner neither gave evidence nor made a statement to the court which was trying him and equally legitimate to call attention to the fact that he gave a number of contradictory statements of his movements and of his knowledge of the facts; but before any decisive emphasis can be laid upon these circumstances it is necessary that there should be some evidence of the accused man's participation in the crime charged against him. Suspicion is not proof.

The statements of each prisoner are evidence against himself only and are inadmissible against his fellow accused.

In a joint trial the only method of testing the strength of the case for the prosecution is to take each man's case separately, neglect the evidence of the other and ask whether the conflicting and inconsistent nature of the matters alleged and persons implicated combined with the admission that the accused man was himself present is enough to justify a verdict against him.

Though proof of motive is not essential it is a material consideration.

The difficulty in all cases where two persons are accused of a crime and where the evidence against one is inadmissible against the other is that however carefully assessors or a jury are directed and however firmly a judge may steel his mind against being influenced against one by the evidence admissible only against the other, nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to the detriment of the other.

C. S. Rewcastle, K. C. & C. Bagram, for Applts.

F. Gahgn & G. Le Quesene, for Respts.

JUDGMENT.

LORD PORTER:—In this case their Lordships have already stated that they would humbly advise His Majesty that the verdict of murder recorded against the two appellants could not stand and that they should be acquitted of the charge made against them. At the same time their Lordships indicated their intention to set out the grounds for tendering such advice, in fulfilment of which promise they now give their reasons.

The two appellants were jointly accused of murdering one Lachmi Prasad on 8—9—1945. Undoubtedely Lachmi Prasad was murdered on that day, but the only direct evidence adduced by the prosecution against the prisoners was that contained in six statements made to the police by Walli Mohammad and six separate statements made by Ali. The statements were taken between 9th and 19th September and in those made by himself each of the accused gave contradictory accounts of his movements on the evening and night of 8th and 9th September. Each began denying any knowledge of the events leading to the crime or of the crime itself, but each at a later stage though denying any participation in it, admitted his own presence when it was committed and implicated his fellow prisoner amongst others, Both expressed their repugnance to the violent act, their horror at its commission, and its unexpectedness. Neither, however, went into the witness box or made any statement from the dock except a denial of his participation in the murder and the case against the prisoners, therefore rests upon the evidence contained in and inference to be drawn from their several statements. It has to be borne in mind that the statements of each of the accused men to the police are inadmissible against his fellow prisoner. Accordingly the question for their Lordships' determination is whether a deduction of guilt can legimately be drawn in the case of either of the accused from the contents of his own statements.

Two further circumstances must be referred to:

(1) The prosecution produced three statements alleged to have been made to the police officers in charge of the case, one by Bhagwan Devi who had been living with Walli Mohammad for some four or five years though not married to him, one by her father Ramsumar and one by his son Ramsaran. Each of these statements would, if they had been admissible in evidence, have been favourable to Walli and unfavourable to Ali Mohammad. All three of the persons concerned, however, when called as witnesses, denied having made or understood the statements attributed to them and further denied the matters therein alleged and both in the Magistrate's Court and in the High Court said they were untrue. These three statements were therefore inadmissible whether in favour of or against either of the prisoners and the prosecution's case, therefore against each man depends solely upon his own individual statements and any deductions which can be drawn from them.

Walli Mohammad's first two statements merely asserted that he knew nothing of the crime. In the third, however, he admitted being present when Lachmi Prasad was killed, but alleged that he personally had nothing to do with it and implicated three persons, viz., one Shiu Sharan son of Panchu, one Bishun Deo, and his fellow accused. In the fourth he gave a different account of the events, made Shiu Sharan strike the fatal blow, but implicated the same three persons and Ramsumar. He gave as the reason for the murder that the victim was friendly with Ramsumar's two daughters and that the other three whom he mentioned also had friendship with the two girls. His fifth statement gave a still different account of the events, accused Ramsumar of striking and killing Lachmi Prasad, said that Ramsumar, Bishun Deo, and he himself alone were present and repeated that he had neither known of or taken part in the murder but had run away immediately after he saw it take place. He added that he had kept silence because he was threatened by Ramsumar. The sixth statement repeated the accusation against Ramsumar and Bishun Deo and again denied that he himself had taken any part in the killing.

Ali's first two statements, like Walli's, contain a denial of any knowledge of or participation in the crime. The third, which appears to have been made after Walli's fourth, alleges an unsuccessful attempt by Walli to persuade Ali to give false evidence in Walli's favour to the effect that both of them were inadvertently present at Lachmi's murder; but had nothing to do with it and that Ramsumar, Bishun Deo and Shiu Sharan were the real perpetrators of the crime. The fourth was made some five days after Wali's sixth and in it Ali again denied his presence at or participation in the murder and further denied that he made any statement or confession to Ramsumar or Ramsaran. His fifth statement, of which the sixth is merely a reaffirmation, suggests that all the persons hitherto mentioned, including Wali, Ramsaran, Dayaram, another son of Ramsumar, and presumably Ali, had joined in a conspiracy to steal motor tyres and that after proceeding in a lorry in order to carry out their alleged plan they had got out of the lorry ostensibly to go to the spot where the tyres were kept but, while still on the way on foot, Walli struck Lachmi with a cane knife. The statement also implicates Ramsaran and Dayaram and possibly Bishun Deo but denies any previous knowledge of and any participation in the commission of the crime by Ali himself. Ali concludes his statement by an allegation that there was blood on Dayaram's and Walli's clothing and that they arranged that Walli should burn it and says that Walli gave as a reason for the murder that Lachmi had put his brother in goal, had burnt his father-in-law's house and been after his own wife.

For the allegation that clothing had been burnt by Walli evidence was adduced from one or two witnesses that Walli was seen ploughing his land on a Sunday morning and that some material which might or might not be burnt clothing was afterwards found there. This evidence was quite inconclusive and no reliance can be placed upon it. The effect of the evidence contained in the statements of each of the accused is that the murder might have been committed by one or more of some five other persons including his fellow prisoner, but not by himself.

In order to exculpate all except the two accused men the Crown called all those whose participation was suggested by either of the prisoners to deny any knowledge of the crime. Some at any rate of these persons were corroborated in their *alibi* and all were believed by the learned Judge who tried the case and by his assessors.

The representatives of the Crown therefore urge that each of the accused has now admitted his presence on the occasion when the murder took place and that the commission of the crime has been brought home to them since the participation of all those, who are said by the

prisoners to have taken part in the act, has been eliminated. The prosecution add that if the accused men were not guilty why did they give so large a number of contradictory accounts of what took place and why did they not go into the witness box to give the true account and exculpate themselves. As the learned Judge put it in the concluding words of his summing up

"You will no doubt ask yourselves whether it is conceivable that these two persons, if they had been innocent, would have made all the contradictory statements they have done, and you will also ask yourselves the question whether it is conceivable that these two persons, if innocent, would not have taken the opportunity which they have had of either giving a statement from the dock or going into the witness box and giving evidence.

Does that not imply—is it not a fair inference–that they did not make a statement and they did not give evidence because they were afraid of making matters worse?"

No doubt it is legitmate for a judge to point out to a jury or to assessors, and himself to take into consideration, the fact that a prisoner neither gave evidence nor made a statement to the Court which was trying him and equally legitimate to call attention to the fact that he gave a number of contradictory accounts of his movements and of his knowledge of the facts, but before any decisive emphasis can be laid upon these circumstances it is necessary that there should be some evidence of the accused man's participation in the crime charged against him. It is true that the circumstances of the present case give grounds for suspicion, but suspicion is not proof.

As their Lordships have pointed out and as was recognized by the learned Judge who tried the case, the statements of each prisoner are evidence against himself only and are inadmissible against his fellow accused. Consequently the only safe method of testing the strength of the case for the prosecution is to take each man's case separately, neglect the evidence of the other and ask whether the conflicting and inconsistent nature of the matters alleged and persons implicated combined with the admission that the accused man was himself present is enough to justify a verdict againt him. In their Lordships' view it is insufficient for the purpose.

Even if the evidence of all those whom each of the prisoner accused of the murder be accepted in full, it is still possible that each is sheltering a third person, and in any case, even if it be possible that one of the two prisoners is guilty, there are no circumstances from which could be deduced which of the two is the guilty one. Moreover though proof of motive is not essential, it is a material consideration, and in the present instance there is, as the learned Judge has pointed out, no satisfactory evidence of motive against either of the accused—against Ali none at all, against Walli only his own admission that at one time he had had a grudge against the dead man because his brother had been arrested for being in possession of arms and Lachmi Prasad was rumoured to have been the informant. But that event had taken place sometime earlier and all the evidence established that the dead man and both the accused had been living in amity for a considerable period of years. Their Lordships do not think it legitimate to speculate as to possible but unproved motives.

The difficulty in all cases where two persons are accused of a crime and where the evidence against one is inadmissible against the other is that however carefully assessors or a jury are directed and however firmly a Judge may steel his mind against being influenced against one by the evidence admissible only against the other, nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to the detriment of the other. That danger is to be seen in the present case when the learned Judge in a careful and accurate summing up to the assessors stresses, it is true, the fact that the evidence or statements of one accused are only evidence against him, yet states that the case for the prosecution is that the accused either alone or with others formed a common intention to murder Lachmi Prasad and did murder him. He goes on to point out that in that case it would not matter who struck the fatal blow. In terms this direction is accurate but it suggests a conspiracy culminating in murder and may well tend to lead to a failure sufficiently to keep in mind the warning as to the limited amount of evidence admissible against each prisoner.

Similarly the learned Chief Justice in a short judgment states categorically :

"There seems, however, to be no doubt but that the two accused, probably in conjunction with other persons, had determined to kill the deceased and that the murder was the result of a prearranged plan."

These observations again suggest a conspiracy which was not charged or proved, and are not

qualified by any consideration of the limitation in the evidence admissible against each of the prisoners. In their Lordships' view it would be unsafe to convict either of the accused men on the only evidence available to implicate him and they have accordingly humbly advised His Majesty that the two prisoners should be acquitted and discharged.

—

Cr. M. P. No. 2398 of 1948
February 16, 1949
SOMASUNDARAM, J.
MOHAMMED IBRAHIM MARACAYAR
v.
ISMAIL MARACAYAR, Power of Attorney agent of Fathima Bi.

Penal Code (XLV of 1860*), S.* 504*—Insulting letter from Vellore to Madras—Offence.*

To constitute the offence under S. 504, *the likelihood of the breach of the peace must be immediately after the provocation or so soon afterwards that it must form part of* res gestae. *Mere insult however gross it may be is not sufficient to bring the case within the section, Hence, a father writing an insulting letter from Vellore to his daughter at Madras is not guilty under S.* 504 *I.P.C.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C. C. No. 2328 of 1948 on the file of the Special Honorary Magistrate of the court of the Presidency Magistrates, Egmore, Madras.

V. T. Rangaswamy Iyengar & A. Nagarajan, for Petr.

C. Narasimhachariar & V. Veeraraghavachari, for Respts.

G. Gopinath for *Crown Prosecutor,* for Crown.

ORDER

The accused is the petitioner herein. The petition is to quash the proceedings in C. C. No. 2328 of 1948 on the file of the Special Honorary Magistrate of Egmore.

The complainant is the daughter of the petitioner herein. There were some misunderstandings between her husband and her father over some money transaction and when a claim was made for the return of the moneys alleged to have been advanced by the complainant, the petitioner herein wrote a letter to his daughter in which he has stated that as he has got only old and torn shoes he has placed an order for better ones and that as soon as he gets them he will send them over to her and her husband. He also stated that old ones may not be satisfactory and therefore he was arranging to send new shoes. On this the complainant's husband as her power of attorney-agent, has filed the complaint against the petitioner for an offence under s. 504 I.P.C.

The petitioner has filed this revison petition to quash the proceedings on the ground that *prima facie* the contents of his letter to his daughter would not constitute an offence under s. 504 I. P. C. This letter was written from Vellore where the petitioner resides to his daughter at Madras.

S. 504 I. P. C. runs as follows:—

"Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Now the question is whether the letter written from Vellore to the daughter in Madras falls within the scope of the section. It is bad taste for the father to write such a letter to his daughter. That the letter undoubtedly constituted an insult to the daughter or her husband, cannot be disputed. But it is doubtful that the petitioner intended or knew it to be likely that the insult will provoke either his daughter or her husband, to break the public peace, or to commit any other offence. To break the public peace the complainant or her husband will have to leave his or her house, go to the railway station and take a train, go to Vellore and go to the house of the petitioner and if by chance he is absent, wait for him and then assult him. This is not the kind of breach of peace that is contemplated in the section. The likelihood of the breach of the peace must be immediately after the provocation or so soon afterwards that it must form part of *res gestae.*

This section, as pointed out by Horwill, J. in *Subbaiah* v. *Venkata Subbamma* [1], is often misused and this is one of those cases where the observation of Horwill, J. applies with great force. As pointed out in that judgment the lower courts often think that a mere insult, however gross it may be, is sufficient to bring the case within the provisions of s. 504, I.P.C. That it is not so has been laid down in *Subbaiah* v. *Venkata Subbamma* [1].

1. [1942] M.W.N. 437 : Cr. 105 (106)

Apart from this, this is a case in which the magistrate should have applied the principle of s. 95 I. P. C. This is a domestic quarrel between the father and the daughter and the daughter should never have taken this to a Criminal Court. The petition is allowed and the proceedings in C. C. No. 2328 of 1948 in the lower court are quashed.

N.T.R. — *Petition allowed*

Cr. R. C. No. 734 of 1948
Cr. R. P. No. 691 of 1948
October 7, 1948
SUBBA RAO, J.

WAHID
v.
THE KING

Cr.P.C. (*V of* 1898) *ss.* 106 & 511—*Conviction under s.* 75 *Madras City Police Act—Binding over—Proof of previous conviction.*

The procedure under s. 511 *Cr. P. C. must be strictly followed whenever the question arises in regard to proof of previous convictions.*

On a conviction under s. 75 *Madras City Police Act, the accused can also be bound over under s.* 106 *Cr. P. C.*

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the Order passed by the Court of the Honorary Presidency Magistrates, Egmore. Madras dated 10—2—48 and made in M. C. No. 43311 of 1947.

M. Srinivasagopalan, for Petr.
Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The Honorary Presidency Magistrates convicted the first accused under s. 75 of the City Police Act and sentenced him to pay a fine of Rs. 25 or in default to one week's rigorous imprisonment. In addition the Court directed him to be bound over under s. 106, Cr. P. C.

The learned counsel for the accused argued that the order under s. 106 Cr. P. C. was bad inasmuch as the provisions of s. 511 Cr. P. C. had not been complied with. Under s. 511 Cr. P. C. particular procedure has been prescribed for proving the previous convictions, and that procedure admittedly has not been followed in this case. Dealing with s. 511 Cr. P. C. the learned Judges of the Calcutta High Court in *Emperor* v. *Sheik Abdul* [1] observed as follows:

"With regard to the statement of the learned Magistrate as to the procedure adopted in the Police Court for the proof of previous convictions, we may say at once that we cannot accept the learned Magistrate's suggestion that Presidency Magistrates are absolved from the ordinary rules of evidence in taking proof of such previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under S. 75 of the Indian Penal Code or in proceedings under Chapter VIII of the Criminal Procedure Code, such previous convictions must be proved strictly and in accordance with law. Unless they are so proved, no court—whether it be that of a Presidency Magistrate or not—can properly take such previous conviction into consideration against an accused person."

These are weighty observations and must be followed strictly whenever the question arises in regard to the proof of previous convictions. But in this case a perusal of the judgment shows that the accused admitted that they had previous convictions. It is very likely that the accused did not think of denying such convictions, as, if denied they could have been easily proved.

The learned counsel also relied upon a judgment of Horwill, J. in *Arumugha Thevar* v. *The Emperor* [2] in support of his argument that in a case where the accused is sentenced under s. 75 of the City Police Act he should not be also bound over under s. 106 Cr. P. C. Tha tjudgment does not support this argument. In that case except the solitary instance of disorderliness for which he was convicted there was no other material before the Magistrate for binding over the accused under s. 106 Cr.P.C. Further the order in this case was passed on 10th February 1948 and practically the period of one year is running out. In the circumstances I think it is not a fit case for interference.

The revision is dismissed.

N.T.R. — *Petition dismissed*

1. [1916] I.L.R. 43 cal 1128

2. [1942] M.W.N. 760 (2):cr. 179 (180)

Cr. M. P. No. 2092 of 1947
April 21, 1948
GOVINDA MENON, J.
Major F. K. MISTRY
v.
THE KING

Cr. P. C. (V of 1898*) S.* 549*—Noncompliance with—Effect—Army Act* (1911), *Ss.* 31, 41 & 69*—Scope of.*

In the interests of speedy administration of justice the High Court can exercise its inherent powers to quash a charge, if it finds that the lower court has acted without jurisdiction to entertain the complaint or frame a charge. Ordinarily the petition must be moved at the earliest possible opportunity, (i. e.) at the commencement of the prosecution.

Under the Army Act of 1911, *the offence of embezzlement of army porperty is triable by both an ordinary criminal court as well as by a court martial.*

A discretion is given to the military authorities by S. 69 *Army Act to decide before which court the proceedings shall be instituted and no compulsory duty is cast by the section on the authorities. The discretion may or may not be exercised and initiation of a prosecution in the ordinary criminal court without the military authorities exercising the discretion under S.* 69 *is not illegal.*

When a person subject to the Army Act is brought before the ordinary criminal court on a charge under S. 409 *Indian Penal Code of missappropriating military property, the magistrate must comply with S.* 549 *Cr. P. C. and R.* 105 *Criminal Rules of Practice and non-compliance renders his proceedings illegal.*

Petition praying that in the circumstances stated therein, the High Court will be pleased to quash the charge framed against the petitioner in C. C. No. 531 of 1947 on the file of the Additional 1st Class Magistrate of Chingleput.

K. S. Jayarama Ayyar, P. Basi Reddi & V. V. Radhakrishnan, for Petr.

Advocate General (K. Rajah Iyer) & Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The petitioner, Major F.K. Mistry who was an Ordnance Officer in charge of the Returned Stores Depot, Almadi, Avadi Sub Area, along with two others was prosecuted firstly for having conspired to remove and continually misappropriate, tentage from the Returned Stores Depot; and secondly in pursuance to that conspiracy of having with his two associates managed, in their capacity as officers belonging to the Ordnance Department in the Indian Army, to remove quantities of tentage from the Returned Stores Depot; and in compensation for which act, the petitioner was paid Rs. 800 out of the sale proceeds of these articles on or about the 31st August 1946. The charge sheet was filed on the 24th July 1947 alleging that the offences were committed on 28—8—1946 and the petitioner received his share of the proceeds of misappropriation on 31st August 1946. Fourteen witnesses were examined for the prosecution and thereafter charges were framed on the 1st November 1947, the charge against the petitioner being one under s. 409 of the Indian Penal Code which is in the following terms:—

"That you on or about the 28th day of August 1946 at Avadi being a Government Servant as Ordnance Officer-in-charge of the Returned Stores Depot, Almadi, Avadi Sub-Area, and in such capacity entrusted with the dominion over certain property to wit, 2 tons 10 cwts. of tentage in weight, committed breach of trust with respect to the said property and disposed of the said property for Rs. 800 and misappropriated the sale proceeds for yourself, and thereby committed an offence punishable under s. 409 of the Indian Penal Code and within my cognizance, and I hereby direct that you be tried by the said Court on the said charge."

Subsequently the prosecution witnesses were recalled and further cross-examined and on the 5th December 1947, Exhibit P–23 was filed on behalf of the prosecution. Thereafter, on the 18th December 1947, the petitioner filed the above application for quashing the charge framed against him by the Additional First Class Magistrate of Chingleput.

It is unnecessary to dwell at any length on the facts and circumstances which have led up to the prosecution or the details of the evidence adduced, for, in an application to quash a charge under s. 561–A of the Criminal Procedure Code all that this Court is concerned with is whether the Court which has framed the charge had jurisdiction on the materials placed before it to act as it did. The specific provision of the Criminal Procedure Code dealing with the quashing of the charge is that contained in s. 216 which empowers the High Court to quash a commitment made by a competent magistrate, or a civil or revenue court, under s. 478, *only* on a point of law. Therefore, every instance of

quashing a charge framed, must be brought within the ambit of the residuary powers not specifically dealt with under the Code. In the interest of the speedy administration of justice, the High Court ought to exercise its inherent powers if it finds that the lower court has acted without jurisdiction in framing a charge and not for any other reason. It is not the function of this court to examine the evidence on which the charge has been framed in any detail to find out how far the charge is justifiable. The proper time for doing that is in an appeal against the conviction if the proceedings result in a conviction. Such being the case, in the present application under s. 561-A of the Criminal Procedure Code I am only concerned with the circumstance whether the lower court had jurisdiction to entertain the complaint or proceed with the enquiry.

I may also say that any application for quashing the proceedings on the ground of want of jurisdiction ought to be moved at the earliest possible opportunity. In this case the petitioner has waited till the charge was framed against him before moving this court. The points raised by him which go to the very root of the jurisdiction of the court holding the enquiry are such as should have been raised before the court at the commencement of the proceedings. But I do not want to dispose of this application on that technical point especially since the matter has been argued at a very great length both by the learned Advocate-General who appeared on behalf of the Crown and by Mr. K. S. Jayarama Ayyar appearing for the petitioner. Both of them have expressed the wish that the points raised should be considered and decided in view of the importance of the questions involved.

It is undisputed that the petitioner who holds the rank of a Major in the Indian Army is governed by the provisions of the Indian Army Act, Act VIII of 1911, which consolidated and amended the law relating to the Government of His Majesty's Indian Forces, such as Indian Commissioned Officers, Viceroy's Commissioned Officers, soldiers and other persons in His Majesty's Indian Forces. This Act came into force on the 1st of January 1912. S. 31 of this Act is contained in Chapter V and it comes under a separate heading designated "Disgraceful Conduct". It states that any person subject to the Indian Army Act who commits any one of the following offences that is to say;—(a) dishonestly misappropriates or converts to his own use any money, provisions, forage, arms, clothing, ammunition, tools, instruments, equipments or military stores of any kind, the property of the Crown, entrusted to him, shall, on conviction by court martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned. It is admitted that if the prosecution story is accepted, the offence mentioned above has been committed. S. 41 is also contained in the same Chapter V and is under the heading 'Civil Offences'. It lays down that every person subject to this Act who, either within British India or at any place beyond British India, commits any civil offence shall be deemed to be guilty of an offence against military law, and if charged therewith under this section, shall, subject to the provisions of this Act, be liable to be tried for the same by court-martial, and on conviction to be punished as prescribed thereunder. The term "civil offence' is defined in s. 7, sub-sec. (18) as meaning an offence which, if committed in British India, would be triable by a criminal court, and this is followed by the definition of the word "offence" as meaning any act or omission punishable under this Act, and includes a "civil offence" as hereinbefore defined. It is contended on behalf of the petitioner that the acts complained against him constitute an offence under S. 31 of the Indian Army Act and such an offence is triable only by a court-martial. Any offence other than that contemplated by s. 31 will come within the residuary s. 41 and may be tried either by a court martial or by the ordinary criminal court; but if the offence is one which comes directly within s. 31, the ordinary criminal courts of the land have no jurisdiction. Therefore, Mr. Jayarama Ayyar argues that the offence of having committed breach of trust in relation to the materials of tentage can, when the person accused is one to whom the Indian Army Act applies, only be tried by a court-martial and for this purpose he has devoted much time and energy on an intensive study of the history and development of the various Army Regulations which existed in India during the time of the East Indian Company subsequent to the thirties of the last century. According to him, criminal breach of trust by a person in the employ of the Army of the East India Company, was made an offence punishable by a court-martial even prior to the enactment of the Indian Penal Code in 1861, pervious to which year there existed no codified penal law in India, so that an Army Officer committing the offence of criminal breach of trust was liable to be dealt with only by a court-martial before the enac-

ment of the Indian Penal Code. The present S. 31 had its predecessors in the various Army Acts and Regulations from 1845 onwards; and a study of those Acts will reveal that from the early times to the enactment of Act VIII of 1911 by which many offences committed by Army personal were made triable by the ordinary criminal Courts, such offences as criminal breach of trust were triable by a court-martial.

It is necessary for a proper understanding and disposal of this argument to go back and find out what exactly was the state of the law both relating to offences committed by Army personnel as well as by civilians about a hundred years ago. During the regin of the Moghul Emperors in India, the Mohammeden law was used in the administration of criminal justice even to persons governed by the Hindu law and Koran was the source from which the principles of Criminal law were obtained. But after the conquest of portions of India by the East India Company and prior to 1860, the English Criminal Law as modified by various statutory enactments was administered in the Presidency Towns of Calcutta, Bombay and Madras. In the mofusil, the administration of criminal justice was mainly based on the rules of Mohammadan Criminal Law, though some of the patent incompatibilities and unsuitabilities of the provisions of that law when applied to people not governed by the tenets of the holy Koran were removed by regulations of the local Governments. But, mainly, prior to 1861, the Mohammadan Criminal Law with such amendments and alterations as were deemed necessary to suit the conditions of the people and the country, was administered in the mofussil of the Madras presidency. The Indian Penal Code came into force on the 1st of January 1862 and from that day onwards there can be no doubt or dispute as to what the prevalent penal law of the country was. S. 409 as we see at present was in the Penal Code from its very inception. We have therefore to see whether the introduction of S. 409 in the Penal Code altered or abrogated the provisions in the Army Regulation regarding kindred offences mentioned there.

The earliest legislative enactment relating to the Army with which we are concerned is Act No. XXIX of 1861 "Articles of War for Native Army" (See the Legislative Acts of the Governor-General in Council, edited by W. Theobald, Volume III, page 938) which received the assent of the Governor-General on the 7th September 1861 and therefore became law prior to the enactment of the Indian Penal Code. This Act repealed various prior Acts. Article 22 of this enactment deals with embezzlement, etc. of money entrusted for public account, or of provisions, or of Military stores, the property of Government, or of conniving at any such offence, and on conviction for any of these offences, by a General Court-Martial, the delinquent was to be punished with dismissal from service, fine to the extent of the arrears of pay and allowances, and imprisonment for a period not exceeding three years. So far as non-military personnel were concerned whether "criminal breach of trust" came within the offences for which a punishment has been definitely fixed in what is called "Hadd" according to the Islamic law is not a profitable subject for discussion at present. But it can be taken as settled that there was no statute law which made such an offence punishable when Act XXIX of 1861 came into force. Articles 124 and 125 of the same Act provide that where any officer or Soldier, in any place within the jurisdiction of any Criminal Court established by Her Majesty or the Government of India or any Local Government is accused of any offence triable by such Court, he shall be delivered over to a Magistrate to be proceeded against according to law. The combined effect of these articles is that where offences such as those mentioned in Article 22 are committed, they will be tried by a General Court Martial and for other offences, the accused person will be delivered over to an ordinary Magistrate. This Act which underwent amendments by Act V of 1863 and Act XXVI of 1865, in certain other matters, was repealed by the enactment of Act V of 1869 called "The Indian Articles of war" which came into operation on the 1st day of June 1869. Article 54 contained in Chapter III deals with an offence by a person subject to those articles, of dishonest misappropriation or conversion to his own use of money provisions, forage, arms, etc., the property of Government entrusted to his charge on the public account, or for any military purpose. It also provides for punishment for dishonestly using or disposing of such property in violation of any direction of a proper authority, or dishonestly receiving or retaining any such property knowing or having reason to believe the same to have been dishonestly misappropriated or converted. Such offencees were triable by a General Court Martial according to the provisions of the Articles. For the first time we see in this

enactment Article 170 styled "non military offences" dealing with offences committed within the territorial jurisdiction of Criminal Courts. It is necessary to extract this Article *in extenso*. (See page 121, Legislative Acts of the Governor-General of India in Council 1869, Volume VI by W. Theobald).

> "Any person subject to these Articles, who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by Her Majesty, or by the Government of India, or by the Local Government, is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, *shall be* delivered over to the nearest Magistrate to be proceeded against according to law".

A reading of these two articles shows that during the time when this enactment was in force, such offences under the Indian Penal Code as were not included in that enactment were alone triable by the ordinary Magistrates and the accused persons should be delivered over to the nearest Magistrate to be proceeded against according to law. Moreover Article 54 occurs in that part of the Act designated "Title II—Military offences" and Article 170 occurs in "Title V.—Non-military offences." This aspect of Mr. Jayarama Ayyar's contention has to be accepted that even after the enactment of the Indian Penal Code an offence of criminal breach of trust of Government property by a person subject to the Articles of War can only be tried by a general court martial and not by the ordinary criminal courts. The natural inference or conclusion on a parity of reasoning, deducible from the Articles mentioned above is that where the offence is one designated as a Military offence and is contained among those mentioned as "Military offences" it is triable exclusively by a general court martial and in the case of all other offences, the ordinary criminal courts have the right to try the offender for which purpose he should be delivered over to the nearest Magistrate. By Act XII of 1894 called "The Indian Articles of War Amendment Act" certain provisions of Act V of 1869 were repealed and other provisions substituted. There were also amendments and modifications of other articles with the result that the Act V of 1869 was appreciably amended by the Act of 1894. Article 70 of Act XII of 1894 repealed the second and third paragraphs of Article 170 of Act V of 1869 retaining the first part intact. By Article 71 of Act XII of 1894, for Articles 171 to 175 (both inclusive) of the earlier Act, new articles were substituted. It is interesting to notice that Article 171 newly inserted is a forerunner of the present S. 41 of Act VIII of 1911. The result of these alterations, amendments and substitutions is that even after 1894, any person subject to the Articles of War who is accused of any offence under the Indian Penal Code not included specifically in these Articles should be delivered over to the nearest Magistrate to be proceeded with according to law. The New Articles 174 and 175 for the first time inserted in the year 1894 corresponded to the present Ss. 59 and 70 of the Indian Army Act which give a discretion to the Military Authorities to decide whether the ordinary criminal court or a Military Court should try an offender subject to the Army regulations. In my opinion the retention of the first part of Article 170 after the second and third parts were deleted makes it clear that the offences contemplated by Art. 174 are such offences under the Indian Penal Code as were not otherwise specifically mentioned in the Regulations, so that the pre-existing state of the distinction between Military and non-Military offences is retained and for non-Military offences alone a discretion is given to the authorities to decide whether an ordinary criminal court or a court martial should try the offender. It cannot be said that by the amendments in 1894, the scope and import of the trial by the ordinary criminal courts are in any way widened. On the other hand such-non Military offences which prior to 1894 could be only tried by the ordinary criminal courts were made triable by a Militry Court also if the authorities in their discretion decided to act in that manner under Article 174 so that if the offence of criminal breach of trust of Military or Government property was committed by an Army Officer, during the time when Act V of 1869 as amended by Act XII of 1894 was in force, it is only a general court-martial that could try the offence.

Now we come to the Indian Army Act in force at the present day, i.e. Act VII of 1911. This Act in very many essentials resembles the English Act which is cited for all purposes as the Army Act 44 and 45 Victoria Chapter 58. A comparison of the various provisions of the Army Act hereinafter known as the Engligh Act with the Indian Army Act is instructive and interesting. The scope of the two Acts, the arrangement of the sections, the manner of the enforcement of discipline, the infliction of punishment and the method of conducting court-martial, are very similar in both the Acts and most of the sections deal-

ing with these subjects in the respective Acts are to a large extent *in pari materia* though not exactly *ad idem*. S. 31 of the Indian Army Act has its counter-part in the sister Act in Ss. 17 and 18 and in particular reference may be made to sub-section (4) of S. 18 which is in the following terms.—(Page 444, Manual of Military Law 1929).

> "18. Every person subject to Military law who commits any of the following offences; that is to say.........(4) steals, embezzles or fraudulently misapplies or receives, knowing them to be stolen or embezzled, any money or goods the property of a person subject to military law, or any money or goods belonging to any regimental mess or band, or to any regimental institution or to the Navy, Army and Air Force Institutes, or any public money or goods".

This sub-section deals with the Military offences of stealing, embezzlement and fraudulent mis-application of Army properties. Corresponding to S. 41 of the Indian Act, we have S. 41 of the English Act dealing with offences punishable under the ordinary law which is as follows :—

> "Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows:—that is to say,
>
> (1) If he is convicted of treason, be liable to suffer death, or such less punishment as is in this Act mentioned:.........
>
> Provided as follows :—
>
> (a) A person subject to military law shall not be tried by court-martial for treason, murder, manslaughther, treason-felony, or rape committed in the United Kingdom, and shall not be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in any place within His Majesty's dominions, other than the United Kingdom and Gibraltar, unless such person at the time he committed the offence was on active service or such place is more than one hundred miles as measaured in a straight line from any city or town in which the offender can be tried for such offence by a competent civil court;
>
> (b) A person subject to military law when in His Majesty's dominions may be tried by any competent civil court for any offence for which he would be triable if he were not subject to military law. (Vide pages 459—460 Manual of Military Law issued by the Army Council 1929, 7th edition).

It is seen that subject to proviso (A) this section in effect gives jurisdiction to a court-martial to try a person subject to military law for any offence. In this respect a reference may be made to Chapter III of the Manual of Military Law above mentioned which at page 21 contains the following passage;

> "Ordinary thefts from civilians may be dealt with by the civil courts or they may be tried by court-martial under s. 41 as civil offences, but to steal, embezzle or fraudulently misapply public or regimental money or goods or property belonging to a person subject to military law or to various military institutions has, in *accordance with long established practice*, been signed out for punishment as a military offence."

It is therefore clear that in England under the corresponding Act the trial of an offence of criminal breach of trust of property belonging to the Army or to the Government was by Military institutions not because of any prohibition imposed upon the ordinary criminal courts but only in accordance with long established practice. S. 162 of the English Act to a certain extent corresponds to Ss. 69 and 70 of the Indian Act whereas s. 157 of the English Act has also its counterpart in the Indian Act in Ss. 66, etc. The English law on the subject is summarised in Halsbury's Laws of England, Hailsham Edition, Volume VIII, page 642, in paragraph 1398, which is as follows:

> "Nothing is to affect any jurisdiction of any civil court to try a person subject to military law for any offence. If he has been previously tried for the same offence by a court-martial, the civil court must, in awarding punishment, have regard to the military punishment, he may already have undergone. Where a person subject to military law has been acquitted or convicted of an offence by a competent civil court, he is not liable to be tried for that offence by court-martial. And he is not so liable if he has been previously acquitted or convicted of the same offence by a court-martial. Similarly a person is not liable to be dealt with

summarily for any offence of which he has been acquitted or convicted by a civil court or court martial."

Therefore it is clear that in England it is only by means of long established practice that the offence of criminal breach of trust of Army property was tried by court-martial instead of by ordinary criminal courts.

After the enactment of the Indian Army Act of 1911, the position here is practically the same. As stated already, though the first paragraph of Article 170 was retained in the Amending Act XII of 1894 the same was repealed when the Act of 1911 was passed by which the words "civil offence" and "offence" were defined. There can be no doubt that if the prosecution story is true, what the petitioner has committed is a "civil offence" as well as "an offence" and in the absence of the reenactment of Art. 170 in the Act of 1911 and also in view of the disappearance of the classification of offences as military and non-military offences, I am inclined to hold that after 1911, an offence like the one with which we are now concerned, is triable both by an ordinary criminal court as well as by a court-martial. I may once again refer to s. 71 of the Indian Army Act which lays down that a person acquitted or convicted by a court-martial may afterwards be tried by a criminal court for the same offence or on the same facts and s. 70 provides that if a criminal court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any alleged offence it may require, the prescribed military authority, at its option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law or to postpone proceedings pending a reference to the Central Government. The fasciculus of sections beginning with s. 66 and ending with s. 71 gives ample justification for holding that the rights and powers of the ordinary criminal courts have been well established by the Act of 1911 to be the same as those obtaining in England. If one may hazard a reason for this, it can be found in the circumstances that in the beginning and in the middle of the last century, the ordinary criminal courts in India were not so advanced or were manned by efficient professional judges that the trial of persons subject to the Army Regulations could be entrusted to such courts with confidence. But by the time the Amending Act of 1894 was passed and certainly by 1911, the Indian Courts had attained such a degree of development and progress that it could be said with justification that they would compare very favourably with any of the ordinary criminal courts in England, though most of the magistracy and some of the Judges in India were not professional lawyers. I can find no justification for holding that in the absence of a section like Article 170 of the 1869 Act in the present-day Army Act, the ordinary criminal courts have no jurisdiction to try an offender for committing breach of trust of Army property.

Relying upon the maxim *Generalia Specialibus Non Derrgant*, Mr. Jayarama Ayyar contends that a special Act like the Army Regulations having provided for the trial of the offence of breach of trust of Army property by a court-martial as early as 1861 and having continued it in the subsequent Acts, unless a special provision is made for its trial by the ordinary criminal courts it should be presumed that the special jurisdiction is retained. In other words, his contention is that in a case where a special Act deals with a subject, a subsequent general Act cannot be deemed to have dealt with it without a special mention of the matter. He also refers to s. 5 of the Indian Penal Code which says that "Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions ....or of any special or Local Law". He relies upon a passage at page 156 of Maxwell on the Interpretation of Statutes, eighth edition, by Sir Gilbert H B. Jackson, which is in the following terms:—

> "Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language."

In *Barker* v. *Edgar* [1], Lord Hobhhouse in delivering the judgment of the Judicial Committee observed as follows;—

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms".

In *Seward* v. *Vera Cruz* [2], the Earl of Selborne, L. C., in his speech observed as follows:-

> "Now if anything be certain it is this,

1. [1898] A. C. 748 (754)
2. 10 A. C. 59

that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

[illegible] his Lordship relies upon the case of [illegible]kins v. *Cathercola* [3] where it was held [illegible] "all those general words about tithes and [illegible]ctories, and so on, were capable of a reasonable application to subjects not affected by any particular legislation, etc." To the same effect is a quotation from a case of the Exchequer Division reported in *Dryden* v. *Overseers of Putney* [4]. Quain, J. observed as follows :—

"It may be laid down as a rule for the construction of statutes, that where a special provision and general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby, and not by the terms of the general provision."

In addition to relying on the above passages, Mr. Jayarama Ayyar has got a further contention to the effect that the repealing of the earlier Army Regulations and the consolidation in the one Act of 1911 does not necessarily deface all the provisions of the repealed enactments, unless stated in positive terms and therefore the spirit of the old Article 170 still remains even if not specifically re-enacted in 1911. For this purpose, my attention is invited to passages in Craies on Statute Law, Fourth Edition. The passage at page 114 to the effect that "to alter any clearly established principle of law a distinct and positive legislative enactment is necessary" is brought to my notice. He also relied upon various passages at pages 132, 135, 305 and 306. In effect, what is contended for is that in construing a consolidated statute the provisions must be traced to what they were at the very inception and effect should be given to those provisions even if they had not been continued throughout. The short answer to this argument is found in the observations of Lord Watson in *Administrator-General of Bengal* v. *Prem Lal Mullick* [5] where his Lordship repels an argument in the following words :

"The respondent maintained this singular proposition, that, in dealing with a consolidating statute each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act was passsed".

Following, as I am bound to do, the above dictum of the learned Law Lord, Mr. Jayarama Ayyar's contention that the enactment of S. 5 of the Indian Penal Code taking away from the operation of that statute all the special and local laws would make the offence of criminal breach of trust of Army property triable only by a court-martial in 1861 and the subsequent consolidation of the various Army Regulations into one Act would continue to keep such an offence triable only by Military Courts, cannot be accepted.

If the very object of consolidation is the collection and co-ordination of the various local enactments till then scattered about over different periods of time, it is a futile attempt in construing such a consolidated statute to probe into the origin of the legislation and delve deep into the times of antiquity to find out the exact causes. The Act of 1911 being the provision of law now in force, I do not think I will be justified in interpreting it with reference to the previous state of the law, though in construing a consolidation Act prior statutes which even if repealed are reproduced in substance are regarded as *in pari materia* and judicial decisions on the repealed statutes are regarded as applicable to *substantially identical provisions* of the repealing Act, it would be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed in order to ascertain what the legislature intended to enact in their room and stead. For, it is almost impossible in the process of consolidation to avoid some dislocation and change in the effect of the consolidated enactments. (Per Lord Watson in *Brodlaugh* v. *Clarke* [6]). The effect of consolidation is stated at length in pages 305 and 306 of Craies on Statute Law, Fourth Edition, and I need not repeat the observations of the learned author supported by a

3. 6 D.M. & G.1
4. L.R. 1 Ex. Div. 223 (232)
5. [1895] 22 I.A. 107
6. 8 A.C. 354 (380)

large body of authority on which he relies. But one thing is clear that by the deletion of Article 170 in the Consolidation Act, the legislature did not intend to keep the distinction between military and non-military offences and the necessity of handing over a person governed by the Army Act to the ordinary criminal courts even in cases of offences not mentioned specifically in S. 41.

Though "The Regulations for the Army in India" issued under the authority of the Government of India are not to be considered as of any binding authority to be followed in the ordinary Courts, still they may afford some guide to a correct appreciation and understanding of the position which the Army authorities adopt in dealing with such matters. Regulation No. 385 of the Army Regulations, Reprint 1942, states that all civil offences except those specified in the proviso to S. 41 of the Army Act can be tried either by a court martial or by a civil Court. Offences under Ss. 27 (d), 35 (a) and (b), and 39(b) and (d) as well as *most offences* under S. 31 can also be tried by a court-martial or a civil court. It is further stated that the procedure to be followed in a case where there is dual jurisdiction is laid down in Ss. 69 and 70 of the Indian Army Act, the prescribed military authority being the General Officer, Commander-in-Chief of the Command, the district, brigade or station commander. Further light is thrown by the instructions contained therein that if the offender is in military or civil custody the officer Commanding the unit or the magistrate will take steps to request the prescribed military authority to decide the court before which proceedings shall be instituted. But in cases falling under S. 41 of the Army Act, not being cases covered by the proviso to that section in which death has resulted, the decision shall rest with the District Commander or the General Officer, Commander-in-chief of the Command. As I have already stated, by the Act of 1911, the position in India has been brought up to the same state as that which was obtaining in England. But in England it was by a course of long established practice alone and not by any statutory authority that the offence of embezzlement of military property was usually tried by a court-martial. Such a well established and long practice has not obtained in India and in view of the various provisions of the Army Act discussed by me above, it seems to me that the offence with which the petitioner is charged can be enquired into and tried both by the ordinary criminal courts in the land as well as by a court-martial. Before leaving this part of the case, I shall advert to the two points raised by the learned Advocate General for the Crown, viz. that under s. 26 of the General Clauses Act, where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence. He contends that even though embezzlement of Army property is made a specific offence triable by a court-martial under s. 31 of the Indian Army Act, nonetheless it is an offence punishable under the Indian Penal Code because s. 2 of the Penal Code enacts that every person shall be liable to punishment under the Penal Code and not otherwise for every act or omission contrary to the provisions thereof of which he shall be guilty within the territories mentioned in the previous section, viz. those which are, or may become vested in the Crown by Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India". According to s. 5 of the Indian Penal Code, this Act is not intended to repeal, vary or suspend any special or local law. Morever s. 5 of the Criminal Procedure Code enacts that all offences under the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, and as regards offences under any other law, the Criminal Procedure Code applies subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Therefore the learned Advocate-General contends that unless by express exclusion the offence of embezzlement of Army property is taken away from the jurisdiction of the ordinary criminal courts, the Criminal Courts in the land have jurisdiction to enquire into and try this offence. The definition of the words "offence" and "civil offence" has already been considered and as the Army Act now stands, it cannot be said that there is any express provision of law which takes away from the ordinary criminal courts, the right and power to enquire into and try an offence of criminal breach of trust whether committed with regard to Army property or other properties; or whether the delinquent is an Army personnel or an ordinary citizen. Therefore the first argument of the learned advocate for the petitioner that an

offence of criminal breach of trust of military property by an officer subject to the Indian Army Act is exclusively triable by a court-martial is unsupported by the provisions of the Indian Army Act.

We have next to consider the second part of the petitioner's contention based upon ss. 69 and 70 of the Indian Army Act, which runs as follows:—

> "69. When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the prescribed military authority to decide before which court the proceedings shall be instituted, and, if that authority decides that they shall be instituted, before a court-martial, to direct that the accused person shall be detained in military custody."

> "70. (1) When a criminal court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any alleged offence, it may, by written notice, require the prescribed military authority at its option either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

> (2) In every such case the said authority shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government whose order upon such reference shall be final."

Rule 167 of the Indian Army Act Rules describes what is meant by a "prescribed authority" under Ss. 69 and 70 of the Act. It says that the prescribed military authority for the purpose of Ss. 69 and 70 of the Act shall be the officer commanding the army, army corps, division, brigade or station in which the accused person is serving; Provided that, in cases falling under s. 41 of the Act, in which death has resulted, the prescribed military authority shall be the officer commanding the army, army corps, division or independent brigade in which the accused person is serving and no lower authority. My conclusion in the earlier part of the judgment that the offence said to have been committed by the petitioner is triable both by a court-martial and by the ordinary criminal court, necessarily involves that s. 69 of the Act is applicable to the present case. Therefore the prescribed military authority may, first of all, decide before which court the proceeding shall be instituted. How far the evidence produced both before the lower court and this court tends to show that the prescribed military authority has exercised his discretion has next to be considered. The quantum of evidence on this part of the case is meagre and consists in certain affidavits of responsible officials in the Central Government as well as an affidavit by the then investigation Inspector of the Special Police Establishment, Government of India, Madras. I accept the statements in them completely. The question is whether the facts mentioned in them are sufficient to lead one to the conclusion that the provisions of S. 69 of the Indian Army Act have been complied with. Mr. Subbiah, the Special Police Inspector, states that after he completed the investigation conducted under the ordinary provisions of the Criminal Procedure Code, he interviewed Brigadier Stevens of the I.A.O.C., Head Quarters, Southern Command, Poona, in charge of Ordinance Depots on 21-2-1947, because the said Brigadier was in charge of the Returned Stores Depot, Alamadi, under Avadi Sub Area, and the petitioner was an officer under that Brigadier during the relevant period. Brigadier Stevens was informed of the details and the result of investigation and was told that there was enough evidence for initiating a prosecution against the petitioner under S. 409, I. P. C. According to the deponent of the said affidavit, the Brigadier, after going through the records and hearing the representations of the Inspector, agreed to the prosecution of the petitioner in a Criminal Court. No doubt what the Brigadier told the Inspector will be hearsay evidence, but certainly the Inspector is competent to depose about the result of the discussions with the Brigadier and to state the latter's concurrence in the view suggested by him. Thereafter the procedure of sending the final reports to the General Head Quarters, New Delhi, through the Inspector-General and the War Department followed. At this point, reference has to be made to another affidavit filed here, viz., from Mr. R. N. Vasudeva, Under Secretary, Ministry of Defence, Government of India, which is in the following terms:—

> "The undersigned R.N. Vasudeva, Under Secretary, Ministry of Defence, Government of India, New Delhi, solemnly affirms as follows:—

> 1. The final report of the Investigating Officer, dated the 29th of March, 1947, and the comments of the Legal Adviser

(Mr. Jain), Delhi Special Police Establishment, New Delhi, dated the 11th of April 1947, and a letter from the Personal Assistant to the Inspector-General of Police, Special Police Establishment, dated the 17th of April 1947, were received by the Ministry of Defence through the Ministry of Home Affairs, who had been moved for grant of sanction under s. 197, Cr.P.C., on the 28th of April 1947.

2. Sanction was requested for the prosecution of Major F. K. Mistry in one case on three counts under s. 409, I. P. C., and his prosecution along with Jamadar Koshi Mathai in another case under s. 120-B read with ss. 409, 409 and 409/109 I. P. C.

3. The file as such with the documents mentioned above was forwarded by the Ministry of Defence to the Adjutant-General's Branch for their concurrence.

4. The concurrence of the Military authorities in the following words was received by my office on the 13th of May 1947, signed by A. A. G/P. S. I :—

"This Branch has no objection to the prosecution in civil court of Major F. K. Mistry and Jamadar Koshi Mathai. These officers will not be claimed for trial by Court-Martial."

5. The undersigned returned the file to the Ministry of Home Affairs on 14-5-1947 with the following endorsement :—

"This Branch has no objection to the prosecution of the officers in question in a civil court."

6. The under-signed solemnly affirms that the statements contained in paras Nos. 1 to 5 above are correct statements of facts and nothing has been kept back."

What transpired at the General Head Quarters New Delhi, is contained in another affidavit sworn to by Captain Sarup Singh, Staff Captain in the Adjutant General's Branch, Personal Services, 1, New Delhi, which is as follows :—

"The undersigned, Captain Sarup Singh, solemnly affirms that he was holding the post of staff Captain P. S. 1 (a) General Headquarters, New Delhi, in April and May 1947."

2. The undersigned solemnly affirms that in the first week of May 1947, our office received from the Home Department, Government of India, copies of the final report of the Investigating Officer of the Delhi Special Police Establishment, and comments of their Legal Adviser for the concurrence of the Department for the prosecution of two cases in civil court.

Major F. K. Mistry was the accused in one case and was recommended for prosecution under s. 409 I. P. C. on three counts.

Major F. K. Mistry and Jamadar Koshi Mathai were accused under s. 120-B read with ss. 409, 409 and 409/109 I P C in the other case.

3. That the undersigned solemnly affirms that the two cases were dealt with by me in the Office of the General Headquarters.

4. That the undersigned solemnly affirms that on 5—5—1947, a signal was sent by the undersigned to the Avadi Sub Area, with copies to Madras Area and Southern Command in the following terms "1382 392/PSI (a) Confidential (.) Misappropriation Stores(.). State if you have objection to trial by civil court Major F. K. Mistry and Jamadar Koshi Mathai of Return Stores Depot Almadi."

(Sd.) Sarup Singh,
Captain,
For Lt. Col.
AAG/PSI,
5 May, 47.

5. That the undersigned solemnly affirms the Avadi, Sub Area was then under the command of a Brigadier.

6. That the undersigned solemnly affirms that on 8—5—1947, the following reply was received from the Avadi Sub Area.—

"Misappropriation Stores. Your 1382392/PSI (A) of 5 May. No objection trial by civil court both individuals. Case handled throughout by Delhi Special Police Establishment."

7. That the undersigned solemnly affirms that from the reply received, it is apparent that copies of the reply were also sent by Avadi Sub Area to Madras Area as also to Southern Command.

8. That the undersigned solemnly affirms that it was thereafter that the A. G's Branch gave their concurrence to the prosecution of Major F. K. Mistry and Jamadar Koshi Mathai in the following terms:—

"This branch has no objection to the prosecution in civil court of Major F. K. Mistry and Jem. Koshi Mathai. These officers will not be claimed for trial by Court-martial.

(Sd).
for Lt. Col. AAG/PSI
10 May 47 (D. Brysen)

9. That the undersigned solemnly affirms that copies of the two signals mentioned in paras Nos. 4 to 6 attached to the affidavit are correct copies prepared from the record

maintained in the office of A G's Branch, P. S. I, Army Headquarters, New Delhi, and which can be produced in court, if desired.

10. That the undersigned solemnly affirms that the above statement of facts is correct to my knowledge and nothing has been withheld or concealed therefrom".

It will thus be seen that on the 10th of May 1947, the Assistant Adjutant General P. S. I., after contacting the Avadi Sub Area replied to the Ministry of Defence that the Adjutant General has no objection to the prosecution of the petitioner in an ordinary criminal court. Thereafter the Ministry of Defence sent back the file to the Ministry of Home Affairs on 14th May 1947 with the endorsement that that Branch had no objection to the prosecution of the petitioner and another in a criminal court. What transpired between the Home Ministry and the Inspector General of Police is not before the court but according to the affidavit of Mr. Subbiah, the Deputy Superintendent of Police received a reply from the Inspector General of Police and he directed Mr. Subbiah to file the charge sheet which was done on 24—7—1947, before the District Magistrate, Chingleput, by the Deputy Superintendent of Police, Special Branch, Madras. The District Magistrate forwarded the two charge sheets to the additional First Class Magistrate, Chingleput for disposal according to law. Mr. Jayarama Ayyar strongly contends that the affidavits of the officers filed before this court ought not to be taken into consideration and that as there is no evidence before the court that the authorities have taken any action under s. 69 of the Indian Army Act, the whole proceedings are void and without jurisdiction. I am not prepared to hold that it is open to the petitioner to object to the reception of these affidavits at this stage, for, the petitioner should have raised the objection to the jurisdiction of the criminal court at the earliest possible opportunity, i. e. before the enquiry began. Not only did he not do so, but the objection was taken for the first time only after the charges were framed and the prosecution had closed its case. I do not intend to lay down as a general proposition that an accused person is not entitled to take objections which go to the very root of the proceedings at any stage later than the commencement of the enquiry. But if an objection is not taken at the proper time but is raised at a much later stage, the prosecution is also entitled to have the answers to that objection put forward by such form of evidence as would be available at that stage.

The procedure in cases of civil offences committed by persons subject to the Indian Army Act is contained in Rule 385 of the Regulations for the Army in India, explaining the applicability of Ss. 69 and 70 and such procedure is amplified a little more in Chapter VI of the Manual of Indian Military Law, 1937, paragraphs 1 to 3 at pages 91 and 92. It is laid down there that in British India and at places outside British India, where a competent civil Court has been established, it is, as a general rule, desirable to try by a civil Court a civil offence committed by a person subject to the Indian Army Act if the offence is one which relates to the property or person of a civilian or is committed in conjunction with a civilian, or if the civil authorities intimate a desire to bring the case before a civil Court. The words "Civil Court" are only used in contradistinction with a Military Court in the context. It is also stated that the general rule is subject to exceptions and qualifications. The line dividing the Military from the civil offence may be narrow. The offence may have been committed within the Military lines. The offender may be one of a body of troops about to proceed on active service. There may be reasons making the prompt infliction of punishment expedient. In any such case, it may be desirable to try the offence by a court-martial. There are further indications that certain civil offences, for example complicated frauds, are not suitable for trial by court-martial and it woud be better to relegate them to the ordinary civil courts, as also cases where intricate questions of law are likely to arise. A perusal of these provisions show that even though an offence of breach of trust relating to Army property can be enquired into and tried by an ordinary civil court, meaning thereby the courts governed by the Criminal Procedure Code, there is no indication whatever that ordinarily they should not be tried by any court other than a court-martial. I have been not referred to any provision of statute, rule or regulation which gives unrestricted and unhampered jurisdiction to court-martial to try an offence of criminal breach of trust of Army property by a person subject to the Indian Army Act in a case where no attention has been paid to the application of S. 69. Therefore what has now to be considered is whether the facts and circumstances mentioned in the affidavits constitute a sufficient compliance with the mandatory provisions of S. 69 of the

Indian Army Act? Has the "prescribed military authority" decided before which Court the proceedings shall be instituted? Can it be said that the officer commanding the Army, Army Corps, Division, Brigade or Station in which the accused person was serving before the filing of the charge-sheet considered the matter and come to a conclusion? I am prepared to accept the affidavit of Mr. Subbiah that during the relevant period Brigadier Stevens was in charge of the Returned Stores Depot., Almadi, under the Avadi Sub Area.

A careful perusal of the affidavits set forth above shows that the Ministry of Home Affairs whom the Special Police Establishment, New Delhi, approached for sanction under S. 197 of the Criminal Procedure Code, forwarded the entire records to the Ministry of Defence which department is the superior authority for the Army General Headquarters in India. In its turn, the Ministry of Defence being ordinarily a civil department wanted to ascertain the decision of the Adjutant-General's branch, General-Head-quarters, which department I am informed is the one which deals with matters like court-martial, etc., under the Commander-in-Chief. It is seen from the affidavit of Captain Sarup Singh that the Adjutant General's office ascertained what the decision of the Southern Command was in the matter. For that purpose a signal was sent to the Avadi Sub-Area which is Controlled by the Madras Area as its immediate superior authority and by the Southern Command above the Commander in the area. The Brigadier-in-charge of the Avadi Sub-Area in his reply dated 8—5—1947 has stated that he had no objection to the trial by a civil Court of the petitioner and others since the case had been handled throughout by the Delhi Special Police Establishment. The affidavit also shows that the Madras Area as well as the Southern Command should be deemed to have concurred in that decision.

If the facts stated in the complaint before the District Magistrate are true, an offence under S. 31 (a) of the Indian Army Act has been committed. That the same set of facts, though they constitute an offence under S. 31, will also constitute an offence under S. 41 as well, is clear from sub-clause (2) of S. 41, which is in the following terms:—

> "The power of a court-martial to try and to punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also a military offence."

Sub-clause (1) of this section refers to the commission of a civil offence either within British India or at any place beyond British India by an Army personnel and it is stated that such an offender shall be deemed to be guilty of an offence against military law as well; so that it necessarily follows that even if the offence of criminal breach of trust is provided for in s. 31, it is also an offence under s. 41 with the result that for such an offence the provisions of s. 69 are applicable. According to the terms of s. 69, "it shall be in the discretion of the prescribed military authority to decide". From this it is abundantly clear that a discretion is given to the prescribed military authority. It may decide before which Court the proceedings shall be instituted. It may not as well decide anything. There is no compulsory duty cast upon the prescribed military authority in all cases where a criminal court and a court-martial have concurrent jurisdiction in respect of an offence, to direct in which court a prosecution should be instituted. The words are not "the prescribed military authority *shall* decide". If the section had been worded "when a criminal court and a court martial have each jurisdiction in respect of an offence, *the prescribed military authority shall decide* before which court, etc." then there is a duty cast upon the authority; but as it stands now it is only a matter of discretion which may or may not be exercised. Therefore, even if I were to conclude, that the various acts and proceedings of the military authorities referred to in the affidavits mentioned above, do not constitute a decision by a prescribed military authority, still I would have held that since the initiation of proceedings need not necessarily be as a result of any such decision, the filing of a complaint before the District Magistrate, Chingleput, was not illegal.

But having considered the various aspects put before me by Mr. Jayarama Ayyar, and the explanation of the actions of the officers of the Adjutant General's office and the Ministry of Defence along with the decision of Brigadier Stevens, it seems to me that there has been a decision by the prescribed military authority before the proceedings were instituted. It is seen from Army Department Notification No. 2163 dated 29th October 1920 the General Officers commanding-in chief Commands and Officers commanding districts and areas are granted the powers of an officer commanding an Army, Corps, Division and a Brigade respectively. (Vide page 142 of the Manual of Indian Military Law, 1937 correct-

ed upto 1942). One may therefore take it that the officer commanding the Madras Area will have the powers of a Brigadier, though the sub-area itself in the present case is under the command of a Brigadier. The General Officer commanding the Southern Command will have the powers of an officer commanding an Army corps. It is a fact well known that an Army consists of a number of corps, a corps consists of a number of divisions and a division consists of a number of brigades. The actual numerical strength of a corps, division or brigade varies with different countries in the world. From the affidavits it can be safely inferred that the officers responsible for the Avadi sub-area, the Madras Area and the Southern Command have considered the matter and decided that the petitioner should be proceeded against in an ordinary civil court. This is also clear from the decision arrived at by Brigadier Stevens as deposed to by Mr. Subbiah. I have not been shown any authority by Mr. Jayarama Ayyar for holding that the decision arrived at by the Adjutant-General in the General Headquarters at New Delhi is not the decision of the officer Commanding the Army. If we consider the whole of the Indian Army as one unit commanded by a Commander-in-Chief with the various commands like the South, East, Central, etc. under him equivalent to army corps, in view of the opinions expressed by the authorities in the hierarchy beginning with the Brigadier-in-charge of the Avadi Sub-area, I do not feel any difficulty in coming to the conclusion that if a decision under s. 69 is a necessary prerequisite to the institution of proceedings in an ordinary criminal Court—though I am doubtful whether it is essential—there has been such a decision by the precribed military authority. In the foregoing paragraphs the use of the term "civil court" is intended to apply to an ordinary criminal court.

We have next to turn to the the third argument advanced on behalf of the petitioner and that is that granting that the offence complained against is not one exclusively triable by a court-martial and therefore the ordinary criminal courts and the court-martial have concurrent jurisdiction and even if the prescribed military authority has decided that the proceedings against the petitioner should be instituted in an ordinary criminal court, still the prosecution has not complied with the imperative provisions of s. 549 of the Criminal Procedure Code and the statutory rule made by the Central Government under the provisions of that section. These statutory rules are contained in R. 105 of the Criminal Rules of Practice and Orders which have been modified and amended from time to time, the last of such amendment being by G. O. M. S. No. 1648, Home, dated 28th May 1945 and G. O. M. S. No. 2099, Home dated 2nd July 1945. The scope and applicability of S. 549 Criminal Procedure Code have recently been considered by this court (Leach, C. J. and Lakshmana Rao, J.) in *In re Capt. Hugh May Stollery Mundy* [7]. In that case an engine room mechanic of the Royal Naval Air Station, Tambaram, was tried by one of the Presidency Magistrates, Madras, and sentenced to a term of rigorous imprisonment for an offence under s. 304-A of the Indian Penal Code. The attention of the magistrate was not drawn to s. 549 of the Criminal Procedure Code or the rules framed thereunder. But objection was taken in the High Court regarding the procedure followed by the magistrate in that he did not conform to the provisions of the rules made under s. 549 Criminal Procedure Code. The learned Judges held that even though his attention was not drawn to it, the magistrate was bound to have followed the procedure laid down in the rules framed under s. 549 and therefore set aside the conviction. The rules as amended by the G. Os. above mentioned run as follows :

"1. These rules may be called the Criminal Procedure (Military Offenders) Rules.

2 Where a person subject to military, naval or airforce law is brought before a Magistrate and charged with an offence for which he is liable under the Army Act, the Naval Discipline Act, the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934 or the Air Force Act, to be tried by a court-martial, such magistrate unless he is moved by the competent military, naval or air force authority to proceed against the accused under the Code of Criminal Procedure, 1898, shall before so proceeding give notice to the Commanding Officer of the accused, and until the expiry of a period of five days from the date of service of such notice, shall not—

(a) convict the accused under s. 243, acquit him under s. 247 or s. 248, or hear him in his defence under s. 244 of the said Code, or

7. [1945] M. W. N. 262 ; Cr. 50 : I. L. R. 1945 Mad. 138

(b) frame a charge against the accused under s. 254 of the said Code, or

(c) make an order committing the accused for trial by the High Court or the Court of Session under s. 213, or sub-section (1) of s. 446 of the said Code, or

(d) transfer the case for inquiry or trial under s. 192 of the said Code, or

(e) issue an order under sub-section (1) of s. 445 of the said Code for the case to be referred to a Bench."

Sub-clause (6) of the rule lays down that the "competent military authority" in clause (2) means the "Brigade Commander." The question therefore is whether the District Magistrate of Chingleput before whom the charge-sheet was filed on 24-7-1947 or the Additional First Class Magistrate, Chingleput, to whom the case was transferred presumably under s. 192 Criminal Procedure Code by the District Magistrate, was bound to follow strictly the procedure laid down in sub-rule (2) of rule 105 of the Criminal Rules of Practice. I may straightaway say that when the charge-sheet was filed before the District Magistrate, the petitioner who is a person subject to military law was not brought before the magistrate charged with the offence. If along with the filing of the charge-sheet the petitioner had been produced by the police before the District Magistrate, the District Magistrate should, before transferring the case for enquiry or trial under s. 192 of the Criminal Procedure Code, follow the procedure in rule 105 (2); i.e. unless the District Magistrate is moved by a competent military authority to proceed against the accused under the Criminal Procedure Code, he should give notice to the Commanding Officer of the accused and allow a period of five days to expire from the date of service before further action is taken. Since the petitioner was not produced before the District Magistrate, I do not think that he was bound to follow the procedure contemplated by the aforesaid rule. But when once the case has been transferred to the Additional first Class Magistrate and the accused person was brought before him charged with an offence like the one in question for which he is liable under the Army Act, then the Additional First Class Magistrate should have strictly followed such a procedure. It is conceded that in this case no competent military authority has moved the magistrate for proceeding with the case in his Court. Therefore the magistrate ought to have issued notice to the Commanding Officer of the accused and waited for a period of five days from the date of service of such notice. In my opinion, the action of the Additional First Class Magistrate in not doing so is illegal and the proceedings before him are void and vitiated by this illegality. In the affidavit of of Mr. Subbiah it is stated that he met the Additional First Class Magistrate on 1—8—47 and apprised him of the fact that the charge-sheets were filed by the members of the Special Police Establishment after obtaining the due consent from the Military Headquarters at Delhi and as such the magistrate was not bound to send a notice to the commanding Officer of the accused as contemplated by the rules. The members of the Special Police Establishment, New Delhi, can under no stretch of language be termed either the competent military authority or the Commanding Officer of the accused person. Even if the prescribed military authority under s. 69 of the Army Act had come to the decision that the proceeding should be instituted in an ordinary criminal Court, still, in my judgment, according to the true and correct interpretation of s. 549 of the Code and R. 105 of the Criminal Rules of Practice, it is incumbent upon the magistrate to give notice to the commanding officer of the accused person. The learned Advocate-General contended that when once the prescribed military authority has come to this decision under s. 69 of the Army Act, the observance of the rule by the magistrate, viz, the issuing of a notice, is not necessary, and the insistence upon the following of that procedure will lead only to multiplicity of proceedings and dilatoriness in their termination. I do not agree. The language of s. 549 Criminal Procedure Code and of r. 105 of the Criminal Rules of Practice is clear and mandatory. When a person subject to the military law is brought before a magistrate charged with an offence for which he is triable under the Army Act, the magistrate is bound to follow this procedure. The decision of the prescribed military authority under s. 69 of the Army Act need not be communicated to the magistrate and even if it is so communicated, he is bound to follow strictly the provisions of s. 549 Criminal Procedure Code and the rules. The learned Advocate General invited my attention to various Ordinances and Act XXV of 1946 by which the Special Police Establishment at New Delhi was created, maintained and continued for the investigation and prosecution of offences relating to the Central Government Departments of which the Army Department is one. He also drew my attention to the circulars and proceedings issued by the Adjutant General's

Branch regarding the co-operation and help which the military officers and authorities have to give to the Police Establishment in their investigation. I do not think that a detailed discussion or examination of these Ordinances and the Act is necessary, for it is not disputed that the Special Police Establishment at New Delhi has the right to enquire into these offences. I am not prepared to hold that since the Special Police Establishment at New Delhi has investigated and filed a charge-sheet against an officer subject to the Indian Army Act with the concurrence or the approval of the military authorities, the magistrate before whom such a person is brought is absolved from the statutory duty of acting according to the rules framed under S. 549 of the Criminal Procedure Code. If the argument of the learned Advocate-General is correct, I cannot find any reason why the Central Government in its rule making power did not make a special exemption in such a case. Rule 105 applies to every case where a person subject to military law is produced before a magistrate governed by the Criminal Procedure Code charged with an offence for which there exists concurrent jurisdiction both in the magistrate as well as in the army authorities. The reason for not providing special exemption from the operation of the rule in case of a prosecution launched by the Special Police Establishment is clear and not far to seek; for a magistrate before whom an accused person is produced should not have the duty cast upon him of finding out how the investigation was started and who the investigators were. As a court administering the law, its duty is merely to see that the accused person brought before it is given a fair and proper trial, and relevant and admissible evidence alone is admitted. But the duty is enjoined upon the magistrate that in the case of a person subject to military law he must first of all give the Officer Commanding a notice intimating him that such a person has been produced. According to sub-rule (4), if the Commanding Officer of the accused gives notice to the magistrate that the accused person should be tried by a court-martial, then the magistrate is bound to stay the proceedings and deliver the accused with the statement prescribed in s. 549 of the Code to the authority specified in this section. It may be that in cases where there has already been a decision that the person should be tried by a criminal court, a subsequent notice is a surplusage and a formality; but as the section stands this court has to interpret it on its plain terms. Another point suggested during the course of the arguments is that it is not open to the accused to raise the point at this late stage. The competent military authority has not moved in the matter. Nor has the accused raised the point at an early stage. I do not think that because the accused person for some reason or other did not object at the earliest opportunity, there can be any question of waiver. If the provisions of S. 549 and the rules are mandatory acquiescence on the part of the accused in an irregular or illegal proceeding will not regularise or legalise the proceedings. In *Nusserwanjee Pestonjee* v. *Meer Mynooden Khan Wallud Meer Sudroodeen Khan Bahadur* [8], the Judicial Committee has held that where under Bombay Regulation No. VII of 1827, among other things it was enacted that a deed of reference to arbitration must contain the time within which the award is to be given and a particular deed of submission to arbitration contained no such provision, it was held that the award could not be enforced even if there was a parol consent given by the parties to the deed of submission before the arbitrator to waive the omission regarding the time at which the award is to be given. Therefore the principle deducible is that where in a statute there are certain necessary requirements to be complied with before proceedings became legal, they should be done according to the statutory provisions and not otherwise. At page 155, Sir John Patteson observes as follows:—

> "The present question turns upon this principle, that wherever jurisdiction is given to a court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulations itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise."

Following that principle, it seems to me that the jurisdiction is given to the Additional First Class Magistrate only after the expiry of five days after giving notice to the Commanding Officer of the person produced before him. In this connection, it is instructive to compare the rules framed on the 12th of March 1935 and published as G. O. 1338, Law (General), dated 16th April 1935 with the

8. [1855] 6 M.I.A. 134

rules as they are now. The repealed rules run as follows :—

"105—
(1) Where a person subject to military, naval or airforce law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court-martial, such Magistrate shall not proceed to try such person, or to issue orders for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless,

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or air force authority, or

(b) he is moved thereto by such authority.

(2) Before proceeding under clause (a) of rule 1 the Magistrate shall give notice to the Commanding Officer of the accused and, until the expiry of a period of five days from the date of the service of such notice, he shall not–

"(a) acquit or convict the accused under Ss. 243, 245, 247 or 248 of the Code of Criminal Procedure 1898 (Act V of 1898), or hear him in his defence under S. 244 of the said Code; or

(b) frame in writing a charge against the accused under section 254 of the said Code; or

(c) make an order committing the accused for trial by the High Court or the court of Session under s. 213 or sub-section (1) of S. 446 of the said Code: or

(d) issue orders under sub-section (1) of S. 445 of the said Code for the case to be referred to a Bench."

The repealed rule gives a discretion to the magistrate for reasons to be recorded, to proceed without being moved by the competent military authority. But even there, before proceeding under clause (a) of sub-rule (1) he has to give notice to the Commanding Officer of the accused and wait for a period of five days from the date of service of such notice. In *Emperor* v. *Jerry D'Sena* [9] Wadia and Sen JJ. had to interpret the rules as they stood prior to the amendment mentioned in 1945. The learned Judges held that where the magistrate was not of opinion that he should proceed to try the accused without being moved thereto by the competent military authority, rule 2 framed by the Government of India will not apply to the case. The only alternative is for the military authorities to move him to proceed to try the accused. If the magistrate having given an opportunity to the prosecution to obtain the authority or permission of the military authorities receives no communication from the military authorities asking him to proceed with the trial he is right in holding that there is no sufficient ground for proceeding with the trial. In that case, because there was no such motion by the military authorities the magistrate discharged the accused. If according to the rules as they stood before 1945, the magistrate could have discharged the accused because he was not moved by the military authorities, *a fortiori* it follows that as the rule now stands the Magistrate could not have proceeded to try the accused without giving the requisite notice.

As I am of opinion that when the petitioner was brought before the magistrate charged with this offence it was the duty of the court to give notice to the commanding officer of the accused, the proceedings before the magistrate relating to the recording of evidence, etc. were illegal and without jurisdiction. I would therefore quash the charge as having been framed without jurisdiction and in excess of authority. The entire proceedings before the learned Additional First Class Magistrate subsequent to the appearance of the accused person before him are therefore set aside. The parties are therefore relegated to the position in which they were when the petitioner appeared before the magistrate. The magistrate is therefore directed to give notice to the commanding officer of the accused and wait for five days to find out what steps the competent military authority is taking and then proceed according to law. The charge as framed is quashed.

N.T.R.

9. [1944] A.I.R. BOM. 271

PRIVY COUNCIL

[From the Supreme Court of British Guiana.]
November 18, 1948.

LORD UTHWATT, LORD DU PARCQ, LORD OAKSEY SIR MADHAVAN NAIR & SIR JOHN BEAUMONT.

NOOR MOHAMED
v.
THE KING

Evidence Act (I of 1872), *s.* 14—*Criminal trial—Evidence of prior offence—Admissibility.*

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudical to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial issue is relevant.

In cases where the accused person sets up no defence other than a general denial of the crime alleged, the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissiblity. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Observations in Rex v. Sims (1946) 1 *K. B.* 531, disapproved.

Where the facts and circumstances of the particular offence charged are consistent with innocent intention, further evidence, which incidentally shows that the accused has committed one or more other offences to prove that they are consistent only with a guilty intent, would be admissible.

The appellant's second wife A died of poisoning and the appellant was tried on a charge of murdering her. There was no direct evidence that the appellant had administered the poison. The evidence was consistent with the theory that A took her own life or that she took poison accidentally. Evidence was given at the trial to meet the possible defences of accident and suicide which tended to show that the appellant had murdered another woman, his first wife, and that the circumstances surrounding the deaths of the two women followed a similar pattern.

Held, *that the evidence was not admissible.*

W. W. K. Page, T. B. W. Ramsay & G. Stone, for Applt.
F. Gahan, for Respt.

JUDGMENT.

LORD DU PARCQ :—After hearing the arguments of counsel for the appellant and for the Crown, their Lordships announced that they would humbly advise His Majesty that this appeal should be allowed and the conviction of the appellant quashed, and would state their reasons for tendering this advice at a later date. Those reasons are set out in this judgment.

The appellant was tried before the Supreme Court of British Guiana on a charge of murdering a woman commonly known, and referred to during the trial, as Ayesha. The jury found him guilty, and he was sentenced to death. Evidence was admitted at the trial to which objection was taken by the appellant's counsel on the ground that it tended to show that the appellant had murdered another woman, his wife Gooriah. It was said on behalf of the appellant that the evidence ought to be excluded as being prejudicial to him and irrelevant. For the Crown it was contended, on grounds which it will be necessary to state later in this judgment, that the circumstances attending the two deaths made evidence concerning the earlier of them relevant to the charge. It was properly conceded at their Lordships' Board on behalf of the Crown that, if the evidence were found to have been wrongly admitted, it would follow, according to the settled principles by which their Lordships are guided in criminal cases, that the appeal must be allowed,

The evidence which related directly to the charge of murdering Ayesha may be summarised as follows. The appellant's wife Gooriah died on the 17th May, 1944. At some time in that year Ayesha had left her husband and gone to live with him. They lived together as man and wife, and there was evidence that in the year 1945 they went through a ceremony of marriage according to the rites of the Mohammedan religion, although Ayesha's husband was still living. After the first few weeks of their union, their life together had not been happy. It was said that the appellant had often beaten Ayesha, and had sometimes driven her from his house. On one occasion she had lived apart from him for two weeks, though she seems to have continued to feel affection for him, and to have been anxious to return to him. The earlier quarrels were due to the fact that the appellant suspected and accused her of infidelity. Later, he made a different charge against her. On a day in August, 1946, a neighbour named Mildred James, who employed Ayesha to do some dress-making witnessed an assault on her by the appellant. She tried to rescue Ayesha, whereupon the appellant said, according to the witness, "Through this woman people got to say I kill my first wife. She must go away." Ayesha refused to go, and the appellant was alleged to have threatened her with the words "If you can't go alive you got to go dead." There was also evidence of a quarrel and a threat by the appellant to kill Ayesha on the night of the 16th September, 1946. On the morning of the following day, Ayesha died of poisoning by potassium cyanide.

It must here be stated that the appellant is a goldsmith by trade and used a solution of potassium cyanide in the ordinary course of his business. He kept it in a press or cupboard. This cupboard was usually locked but the padlock in use was defective, and it was not difficult to force the cupboard door. Potassium cyanide is a poison which acts quickly; and causes loss of consciousness in a few seconds.

Ayesha was said to have been seen alive at or after 9 o'clock in the morning of the 17th September. A witness called for the Crown swore that he had then seen her go with the appellant into the house in which they lived. This evidence was inconsistent with statements made by the appellant. According to him his daughter, a child of fourteen, had awakened him shortly before 9-30 a. m. from a sleep which followed a drinking bout, and had told him that Ayesha "was frothing". He said that he had found the woman unconscious. After some delay, he had reported this to a chemist in the neighbourhood. It appeared that he had told this chemist that he had gone to fetch a doctor, but had not found him at home. He was advised to take his "wife" to hospital and did so between 9 and 10 a. m. The appellant, at the request of the assistant dispenser there, had produced a sheet on which Ayesha had vomitted. There was a stain on it which the appellant said smelled like gold solution. The assistant dispenser said he could smell nothing. Ayesha was given a stimulant by the assistant dispenser, and the appellant was advised to take her to the doctor. At 11 o'clock the appellant arrived at a doctor's surgery, bringing with him what the doctor found to be the dead body of Ayesha.

A post-mortem examination showed without doubt that death was due to cyanide poisoning. It also indicated that there had been exaggeration in some of the evidence as to the more recent assaults on Ayesha by the appellant, since, although some "bruise blood" was found near the right kidney, there were no external signs of violence.

This evidence having been given, the question was argued, in the absence of the jury, whether evidence tendered as to the death of Gooriah should be admitted. The learned Judge, after an elaborate argument, decided to admit it. At this stage the defence had put forward no theory as to the manner in which the poison had been taken by, or administered to, Ayesha. Later, in his final address to the jury, counsel for the defence suggested that the facts were consistent with suicide.

Counsel for the appellant at their Lordships' bar laid stress on the fact that, at the trial, counsel for the Crown in the course of his submission that the evidence complained of was admissible, stated, according to the note of his submission, that the appellant had said to Ayesha, "I will get rid of you as I got rid of my first wife." This sentence certainly occurs in the notes, but their Lordships think that it must have been intended and understood as a gloss or comment on the facts proved rather than an allegation of fact. If it had been intended as a quotation from a statement made by the appellant it would have been easy for the appellant's counsel to point out, what indeed the learned Judge would himself have observed, that there was no evidence that he had used the words imputed to him.

Their Lordships do not find it necessary to set out in any detail the evidence relating to

Gooriah's death. It is sufficient to quote in full paragraph 7 of the respondent's case which is as follows:—

"The prosecution then called a great deal of evidence relating to Gooriah's death, including evidence of the following facts:

(1) The appellant believed Gooriah to be unfaithful and used to beat her.

(2) The appellant had said of Gooriah to Ayesha's husband 'Buddy ah got a mind to poison this bitch.

(3) Gooriah on the day of her death, the 17th May, 1944, went to the nearby house of the appellant's brother-in-law, carrying a piece of folded white paper wrapped in her hand. She had had toothache and the appellant was overheard to say to her 'You must drink this it will do you good.'

(4) Shortly after a boy ran for the appellant shouting 'Pawah Gooriah dead.' The appellant went to the house and summoned Dr. Besson, who was passing.

(5) The accused went to the window and called a boy to bring him a paper, similar to that which Gooriah had had in her hand, from the yard. The boy brought the paper which the appellant handed to Dr. Besson saying it smelt of cyanide. The doctor found that the paper had no substance on it and had no smell. A little later the appellant brought the doctor an enamel cup saying 'This cup smells of cyanide.' The cup was empty and had no smell.

(6) Gooriah died, and Dr. Besson's examination showed her death to be consistent with potassium cyandie poisoning. On analysis 2 grains of potassium cyanide were found in Gooriah's stomach. Dr. Besson stated that her death was caused by cyanide poisoning."

Their Lordships now turn to the important question of law raised by this appeal. By the terms of the Criminal Law (Procedure) Ordinance in force in British Guiana the practice and procedure there are in general the same as the practice and procedure in force in criminal causes in the High Court of Justice and Courts of Assize in England. There are no special provisions in the Ordinance to which their Lordships find it necessary to refer.

The first comment to be made on the evidence under review is that it plainly tended to show that the appellant had been guilty of a criminal act which was not the act with which he was charged. In *Makin* v. *Attorney General for New South Wales* [1], Lord Herschell then Lord Chancellor, delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." In 1934 this principle was said by Lord Sankey, then Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country." (*Maxwell* v. *The Director of Public Prosecutions* [2]).

The second principle stated in *Makin's* case [1] was that "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The statement of this latter principle has given rise to some discussion. A plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged, and if the Crown were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied and perhaps could not be the subject of rational dispute, to adduce evidence of a previous crime, it is manifest that the protection afforded by the "jealously guarded" principle first enunciated would be gravely impaired.

This aspect of the matter was considered by the House of Lords in *Thompson* v. *The King*[3]. Their Lordships need not allude to the facts of that case. It is enough to say that the evidence there admitted was held to be relevant as one of the indicia by which the accused man's identity with the person who had committed the crime could be established. (See per Lord Parker of Waddington at p. 231.) In the words of Lord Atkinson it rebutted the defence of an alibi which otherwise would have been open (pp. 230-1). Nothing of the kind can be suggested in the present case. The value of the case for the present purpose is

1. [1894] A. C. 57 (65)

2. [1935] A.C. 309 (317, 320)

3. [1918] A.C. 221

that Lord Sumner dealt particularly with the difficulty to which their Lordships have referred, and stated his conclusion as follows: "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Their Lordships respectfully agree with what they conceive to be the spirit and intention of Lord Sumner's words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by Lord Sumner must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalant to saying "Let the prosecution prove its case, if it can", and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence. It is right to add however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case. They have asked themselves, adopting the language of Lord Sumner in *Thompson's* case [3] at p. 236 "What exactly does this purport to prove?". At the trial the learned counsel for the Crown, when submitting that the evidence should be admitted, referred to the possible defences of accident and suicide. In his address to the jury he said, according to the note that the evidence was led "to meet the defence of suicide", and pointed out that the circumstances surrounding the deaths of the two women "followed a similar pattern." At their Lordships' bar it was submitted that this similarity of circumstances would lead to the inference that the appellant administered poison to Ayesha with felonious intent.

There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in *Makin's* case, "that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried", and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground. Assuming that it is consistent with the evidence relating to the death of Ayesha that she took her own life, or that she took poison accidentally (one of which assumptions must be made for the purposes of the Crown's argument at the trial) there is nothing in the circumstances of Gooriah's death to negative these possible views. Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide. As to the argument from similarity or circumstances, it seems on analysis to amount to no more than this, that if the appellant

murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason. If the appellant were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah in similar circumstances might well have been admissible. There was, however, no direct evidence in either case that the appellant had administered the poison. It is true that in the case of Gooriah there was evidence from which it might be inferred that he persuaded her to take the poison by a trick, but this evidence cannot properly be used to found an inference that a similar trick was used to deceive Ayesha, and so to fill a gap in the available evidence. The evidence which was properly adduced as to Ayesha shows her to have been acquainted, as it were, it may be supposed, most of the inhabitants of the village in which the appellant lived, with fact that suspicion rested on him in respect of Gooriah's death, and the theory that Ayesha was deceived into taking poison by a similar ruse to that which is supposed to have succeeded with Gooriah seems to their Lordships to rest on an improbable surmise. The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha. In these circumstances the verdict cannot stand, notwithstanding the care with which the learned judge summed up the case and the fairness with which the trial was conducted in all other respects.

Their Lordships are aware that their statement of the principles to be applied to such a case as this, and of the right way of applying them, may not accord with some at least of the dicta contained in a recent decision of the Court of Criminal Appeal in England, to which counsel rightly directed their attention. In *Rex v. Sims* [4] the Lord Chief Justice, delivering judgment, expressed the opinion of the Court as to the proper method of approaching a question concerning the admissibility of evidence of other offences than that charged in these words :—

"If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view."

With all due deference to the Court of Criminal Appeal, their Lordships feel bound to say that they are not convinced that the method of approach which it thus approved has any advantage over that which it rejects as incorrect. The expression "logically probative" may be understood to include much evidence which English law deems to be irrelevant. Logicians are not bound by the rules of evidence which guide English courts, and theories of probability sometimes cause a clash of philosophic opinion. It would no doubt be wrong to interpret the observations of the Court of Criminal Appeal as meaning that evidence can sometimes be admitted merely for the reason that it shows a propensity in the accused to commit crimes of the nature of that with which he is charged. It cannot be supposed that the Court intended to lay down a proposition which would conflict with principles which have been laid down, or approved, by the House of Lords. It may be assumed that it is still true to say, as Lord Sumner said thirty years ago: "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime." (*Thompson* v. *The King* [3] at p. 232). If all that the Court meant to say was that evidence of the kind specified in the first of the principles stated in *Makin's* case [1] may be admitted if it is relevant for other reasons, then the dictum has no novelty. It does seem, however, that the passage quoted was intended at least to bear the meaning that evidence ought to be admitted which is in any way relevant to a matter which can be said to be in issue, however technically, between the Crown and the accused, because a little later in the judgment the following passage occurs:—

"In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the

4. [1946] 1 K.B. 531

accused, the nature of the act and the existence of any necessary knowledge or intent."

The Court of Criminal Appeal would thus appear to have rejected altogether the opinion of Lord Sumner which, although, as their Lordships have said, they believe that it must in one respect be somewhat qualified, has hitherto been generally accepted as a governing principle. Recent dicta of the Court of Criminal Appeal, though carrying great weight, do not necessarily outweigh earlier dicta in the House of Lords or the Court of Crown Cases Reserved, or in the Court of Criminal Appeal itself, and if their Lordships have correctly understood those which they have quoted, they can only regard them as in some degree inconsistent with settled principle. Their Lordships think that a passage from the judgment of Kennedy, J. (as he then was) in the well-known case of *R.* v. *Bond* [5], may well be quoted in this connection:—

> "If, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in *Maxwell's* case [2] (*ubi sup.* at p. 320) when he said "It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions. They must add, however, that though they have been unwilling to adopt the approach to the problem which the Court of Criminal Appeal has recommended they of course refrain from expressing any opinion as to the propriety of the actual decision in *Sims's* case [4]. It is unnecessary, and therefore undesirable, that they should do so.

—

5. [1906] 2 K.B. 389 (398)

PRIVY COUNCIL

[From the High Court of Judicature at Fort William in Bengal]

October 21, 1948

LORD SIMONDS, LORD MORTON OF HENRYTON & LORD REID

PHANINDRA CHANDRA NEOGY

v.

THE KING

Cr.P.C. (*V of* 1898), *s.* 197—*Applicability.*

No sanction under s. 197 *Cr.P.C. is necessary for the prosecution of a public servant for an offence under S.* 161 *Penal Code.*

There is no justification for the view that sanction under s. 197 *is necessary only where the offence charged is an act which would not be an offence unless committed by a public servant. It is neither with all such offences nor only with such offences that s.* 197 *deals. It deals with offences alleged to have been committed by a public servant 'while acting or purporting to act in the discharge of his official duty'.*

A. G. P. Pullan, for Applt.

J. Megaw, for Respt

JUDGMENT

LORD SIMONDS: This appeal is brought by special leave from a judgment of the High Court of Judicature at Fort Willam in Bengal dismissing the appeal of the appellant, Phanindra Chandra Neogy, from the conviction and sentence passed on him by the Chief Magistrate, on the 10th April, 1946.

The conviction was for an offence under S. 161 of the Indian Penal Code and the sentence was one of twelve months' rigorous imprisonment. It is convenient to set the charge which was in these terms:

> "That you Phanindra Chandra Negoy, on or about the 19th day of the September, 1945, in the Town of Calcutta being a public servant to wit, a Railway servant and an inspector in the office of the Regional Controller of Priorities accepted from one Sohanlal a gratification other than your legal remuneration to wit, the sum of Rs. 500 only as a motive or reward for showing favour to the said Sohanlal in the exercise of your official functions relating to an application by the said Sohanlal for being allowed two wagons, one from Allahabad and another from Benares and thereby you the said Phanindara Chandra Neogy committed an offence punishable under S. 161 of the Indian Penal Code and within my cognizance."

The single ground upon which the petition for special leave to appeal was based was that,

no sanction for the prosecution of the appellant having been obtained either under s. 270 of the Government of India Act, 1935, or under s. 197 of the Criminal Procedure Code, the Chief Magistrate had no jurisdiction to try or convict him, and it was upon this ground that special have to appeal was granted, for similar leave had been given in *Gill* v. *the King* [1], a case then pending, in which the same question (together with other questions) was raised.

In January, 1948, this Board heard, and in February, 1948, delivered judgment in *Gill* v. *the King* [1], now reported in L. R. 75 I. A. at page 41. In the course of that judgment their Lordships thought it proper to express their view upon the scope of S. 197 of the Criminal Procedure Code. Having observed that thay found it impossible for any relevant purpose to differentiate between S. 270 of the Government of India Act and S. 197 of the Criminal Procedure Code they proceeded as follows: "A public servant can only be said to act or purport to act in the discharge of his official duty, if the act is such as to lie within the scope of his official duty. Thus a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be, whether the public servant, if challenged, can reasonably claim that what he does, he does in virtue of his office." Applying this reasoning to the case of Gill, a public servant, who had been charged together with one Lahiri, with being a party to a criminal conspiracy to cheat the Government, whereby offences under s. 120B read with s. 420 of the Indian Penal Code were alleged to have been committed, and had also been charged with offences under s. 161 of the Code, their Lordships held that no sanction under s. 197 of the Criminal Procedure Code was necessary.

In face of this judgment the present appeal appeared to have little chance of success. It was nevertheless argued fully by counsel and their Lordships have had the opportunity of reconsidering the whole question. They cannot accede to the suggestion of counsel that that part of the judgment which has been cited is to be regarded as *obiter dictum*. The scope of s. 197 and its applicability to Gill's case were put in the forefront of the written case he presented to the Board and it was the first of his formal reasons that the sanction, for which that section provides, ought to have been, but was not given. The question was argued at length by the respondent's if not by the appellant's counsel and their Lordships treated it as a matter which required their deliberation and decision. In such circumstances it is irrelevant that a judgment upon other point raised in the case might have rendered such a decision unnecessary.

Their Lordships then have before them a decision upon facts which in no material respect differ from those of the present case. Even so, it is, as they recognise, competent for them humbly to tender advice to His Majesty inconsistent with the previous decision, though it can only be in the most exceptional circumstances that such a course should be taken; see *Re* Payment of Compensation to Civil Servants under Article 10 of Agreement for a Treaty between Great Britain and Ireland, reported in 1929 A. C. at page 242, and the cases there cited. Recognising the possibility, they have heard full argument and, having done so, see no reason to doubt the validity of the reasoning or the correctness of the conclusion in Gill's case, and they do not think it necessary to repeat what was said there. Learned counsel for the appellant in the present case laid stress upon what he described as a long line of authority in favour of the view that, where the offence charged is an act which would not be an offence unless committed by a public servant sanction under s. 197 is necessary. Their Lordships without scutinising the authorities, which do not appear entirely to support this view, would observe that it is the words of s. 197 as amended in 1923 and nothing else that must be considered, and that they can see no justification for reading the section as if the words "which under the Criminal Procedure Code is an offence only if committed by a public servant" were inserted in the appropriate place. It is neither with all such offences nor only with such offences that s. 197 deals. On the contrary according to its plain words it deals with offences alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty." To these words a meaning was ascribed in Gill's case, to which their Lordships after reconsideration adhere. It has not been disputed that if s. 197 is so construed, no sanction was necessary for the prosecution of the appellant. Their Lordships have therefore humbly advised His Majesty that this appeal must be dismissed.

— *Appeal dismissed*

1. [1948] M.W.N.477:Cr 97(2) : 75 I.A. 41 P.C.

PRIVY COUNCIL

[From the High Court of Judicature at Patna]

February 17, 1949

VISCOUNT SIMON, LORD OAKSEY, LORD MAC DERMOTT, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

BHUBONI SAHU

v.

THE KING

Evidence Act (*I of* 1872), *ss.* 30, 114, 111 (*b*) & 133—*Cr.P.C.* (*V of* 1898), *s.* 164—*Evidence of approver—Corroboration required.*

A statement made under s. 164 *Cr.P.C. can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in court by the person who made the statement.*

*The statement made by the approver under s.*164 *does not amount to the corroboration in material particulars which the courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition.*

The law in India relating to the evidence of accomplices is substantially the same as the law in England.

It would be unsafe to rely implicitly on the evidence of a man who had desposed on oath to two different stories.

The approver in his evidence stated that the cloth of the murdered man was thrown over a bush by the accused and it was recovered from the place pointed out by the approver. The approver also said that the accused gave a khantibadi to the approver, that he passed it on to T and T handed it over at the house of the accused. The police recovered a khantibadi from the house of the accused and no blood stains were found on the instrument. The evidence was that a khantibadi was an instrument commonly possessed by agriculturists and there was nothing strange in finding one at the house of the accused.

Held *neither the finding of the piece of cloth nor the production of the khantibadi tended to implicate the accused in the crime; nor afforded such corroboration of the evidence of the approver as the rule of prudence required.*

The confession of a coaccused can be used only in support of other evidence and cannot be made the foundation of a conviction.

*Whilst a conviction upon the evidence of an accomplice supported only by the confession of a coaccused may be justified in law under S.*133 *Evidence Act and whilst the coincidence of a number of confessions of coaccused all implicating the particular accused, given independently and without an opportunity of previous concert, might be entitled to great weight, nevertheless court should be slow to depart from the rule of prudence based on long experience, which requires some indepedent evidence implicating the particular accused.*

The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused.

JUDGMENT.

SIR JOHN BEAUMONT: This is an appeal by special leave from the judgment and order of the High Court of Judicature at Patna dated the 19th September, 1947 dismissing an appeal against the judgment and order of the court of the Sessions Judge of Ganjam-Puri dated the 23rd July, 1947 whereby the appellant was convicted of the offence of murder under S. 302/34 of the Indian Penal Code and sentenced to death. At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal be allowed and would state their reasons later. This they now proceed to do.

It is not in dispute that on the 11th October 1946 one Kalia Behara was brutally murdered at a place between Berhampur, where he lived and carried on business as a jutka driver, and Golantra, to which he was driving with passengers in his jutka. It is unnecessary to refer to the details of the murder; though it may be noted that the motive attributed to the appellant was that he is a relation of Accused Nos. 1 and 2 who are said to have been on terms of enmity with the deceased, but both of whom were acquitted of the murder. Eight persons were charged with the offence and tried by the Sessions Judge of Ganjam-Puri. The learned judge convicted six of the accused including the appellant, who was accused No. 7, and one Trinath, who was accused No. 5. The six convicted persons appealed to the High Court at Patna. Two of the appeals were allowed, but the other appeals, including those of the appellant and Trinath, were dismissed. The only question which arises in this appeal is whether there was evidence upon which the appellant could be properly convicted.

The evidence against the appellant consisted of (a) the evidence of Kholli Behera who had taken part in the murder and had become an approver; (b) the confession of Trinath recorded under s. 164 of the Code of Criminal Procedure which implicated both himself and the appellant in the murder, but which was retracted in the Sessions court; and (c) the recovery of a loin cloth identified as the one which the deceased was wearing when he was assaulted, and a khantibadi, or instrument for cutting grass, in circumstances alleged to implicate the appellant.

The law in India relating to the evidence of accomplices stands thus:—Even before the passing of the Indian Evidence Act, 1872, it had been held by a Full Bench of the High Court of Calcutta in *R.* v. *Elahee Buksh* [1] that the law relating to accomplice evidence was the same in India as in England. Then came the Indian Evidence Act which by s. 133 enacts that "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." Illustration (B) to s. 114 of the Evidence Act however provides that "The court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars." Reading these two enactments together the courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore, is substantially the same on the subject as the law in England, though the rule of prudence may be said to be based upon the interpretation placed by the courts on the phrase "corroborated in material particulars" in illustration B to s. 114.

The approver in the present case was a man aged about twenty. He was arrested on the 12th October, 1946, the day after the offence, and on the 14th October was sent by the police to a magistrate, who was called as a witness at the trial, and who on 15th October recorded a statement of the approver under s. 164 of the Code of Criminal Procedure. In this statement the approver described the murder, and alleged in effect that he and Trinath had been engaged by the appellant to assist in the murder, which they did; that in the struggle the cloth of the murdered man became untied and the appellant threw it over a bush. On the 17th February, 1947 the approver, having been tendered a pardon gave evidence before the Committing Magistrate. His evidence followed the general lines of his statement made under S. 164 but added some further details. In particular he said that the appellant gave him a khantidadi which he, the approver, subsequently gave to Trinath who handed it over at the appellant's house. The approver also alleged that the appellant gave to each of them, himself and Trinath, a sum of Rs. 25, presumably as remuneration for the part they had taken in the murder. On the 8th July, 1947 the approver gave evidence in the Sessions Court. His evidence was that he knew nothing about the murder, and he denied all the facts to which he had deposed before the Committing Magistrate. He affirmed that his evidence before the Committing Magistrate was the result of beating and tutoring by the police, and he denied that he had made any statement at all before a magistrate under S. 164 of the Code of Criminal Procedure. Thereupon the Sessions Judge brought the evidence of the approver given before the Committing Magistrate upon record under S. 288 of the Code of Criminal Procedure, the effect being to make the evidence given before the Committing Magistrate evidence in the case for all purposes. Both the learned Sessions Judge, and the learned judges of the High Court in appeal, preferred the evidence given by the approver before the Committing Magistrate to his evidence given in the Sessions Court. Some discussion took place in the High Court as to whether under S. 157 of the Evidence Act the court could use the statement made by the approver under S. 164 of the Code of Criminal Procedure. S. 157 is in these terms:—

> "In order to corroborare the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

A statement made under S. 164 of the Code of Criminal Procedure can never be used as substantive evidence of the facts stated, but it

1. [1866] 5 W.R.Cr. 80

can be used to support or challenge evidence given in court by the person who made the statement. The statement made by the approver under S. 164 plainly does not amount to the corroboration in material particulars which the courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition. But in considering whether the evidence of the approver given before the Committing Magistrate was to be preferred to that which he gave in the Sessions Court, the court was entitled to have regard to the fact that very soon after the occurrence he had made a statement in the same sense as the evidence which he gave before the Committing Magistrate.

Although the learned judges of the High Court accepted the evidence of the approver given before the Committing Magistrate, they appreciated that it would be unsafe to act upon such evidence unless it were corroborated in the manner required by the rule of prudence. Apart from the suspicion which always attaches to the evidence of an accomplice it would plainly be unsafe, as the judges of the High Court recognised, to rely implicitly on the evidence of a man who had deposed on oath to two different stories. The learned judges stated the principle upon which they proposed to act in these terms:—

> "It is of the utmost importance, however, that such evidence (i. e. the evidence of an approver admissible under S. 288 of the Code of Criminal Procedure) before it can be acted upon as against other accused persons, should be corroborated by independent evidence in meterial particulars. The corroboration must be not only with regard to the occurrence but also as against each of the accused sought to be implicatad in the crime."

Acting upon this principle the learned judges proceeded to consider, in the case of each accused, whether the evidence of the approver was sufficiently corroborated against him. They were not prepared to accept the confession of Trinath, who was also an accomplice, as sufficient corroboration of the evidence of the approver; and in the case of Mata Simma, who was accused No. 6, against whom there was only the evidence of the approver and Trinath, they allowed the appeal; but as against the appellant, they found sufficient independent corroboration in the discovery of the deceased's cloth and the production of the khantibadi. With regard to, the cloth, as already noticed, the evidence of the approver was that the appellant threw the cloth over a hedge, and it was proved at the trial that the cloth was found in the place pointed out by the approver. This fact no doubt was of value as supporting the general credibility of the approver's story but there is nothing beyond the statement of the approver to connect the appellant with the cloth. It was not found at the appellant's house, or in any place under his control and the statement made by the approver that it was the appellant who threw the cloth to the place where it was found is of no more, and no less, value than his statement that the appellant took an active part in the murder. Sir Valentine Holmes for the Crown admitted that he could not rely on the finding of the cloth as a piece of corroborative evidence implicating the appellant. With regard to the khantibadi the evidence of the approver was that the appellant gave it to him, that he passed it on to Trinath, and Trinath handed it over at the house of the appellant, and the police recovered a khantibadi from the house of the appellant where it was produced, somewhat unwillingly, by the appellant's mother. No blood stains were found on the khantibadi so produced, and there is nothing on the record from which it can be inferred that it was that khantibadi which was employed in the murder. Had a khantibadi been the sort of instrument which would be unlikely to be found in the house of an agriculturist it would no doubt be a striking coincidence that a khantibadi was handed over by Trinath at the appellant's house and one was subsequently found there. But the evidence is that a khantibadi is an instrument commonly possessed by agriculturists, and there was nothing strange in finding one at the house of the appellant. The High Court attached some importance to the unwillingness of the mother of the appellant to produce the khantibadi, but such unwillingness is in accord with the unco-operative attitude which agriculturalists, and particularly female members of the family, usually display towards police investigations. In their Lordships' view neither the finding of the piece of cloth nor the production of the khantibadi tends to implicate the accused in the crime, nor affords such corroboration of the evidence of the approver as the rule of prudence requires.

Sir Valentine Holmes did not rely strongly upon these pieces of alleged corroboration. He concentrated his argument mainly on the contention that the High Court was wrong in not accepting the confession of Trinath as sufficient corroboration of the evidence of the approver. This involves consideration of the position of the confession of a co-accused under Indian law. S. 30 of the Evidence Act enacts:

> "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession."

This section was introduced for the first time in the Evidence Act of 1872, and marks a departure from the Common Law of England. It will be noticed that the section applies to confessions, and not to statements which do not admit the guilt of the confessing party. In the present case the courts in India appreciated this, and ruled out statements made by certain of the accused which were self-exculpatory in character. The statement of Trinath was, however, a confession. S. 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in S. 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. S. 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confesssion is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct. Sir Valentine Holmes puts his case in this way. He relies on one of the examples given by the Evidence Act of the sort of facts to which the court should have regard in applying illustration B to s. 114 of the Evidence Act. The example is in these terms:—

> "A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

Sir Valentine contends that Trinath's confession was made independently of that of the approver, that neither he nor the approver had any reason for falsely implicating the appellant, and that the confession does afford sufficient corroboration to justify acceptance of the evidence of the approver, even if it does not amount to corroboration in material particulars within illustration (B) of s. 114. The evidence on record however does not support this argument. The confession of Trinath is a very short one and gives only the bare outline of the story. It discloses nothing which the police had not been able to ascertain from the approver, and affords no intrinsic evidence of its truth. It was, as already noted, retracted in the Sessions Court. Retraction of a confession by an accused is a common phenomenon in India. The weight to be attached to it must depend upon whether the court thinks that it was induced by the consideration that the confession was untrue, or by realization that it had failed to secure the benefits the hope of which inspired it. Their Lordships will assume that the confession of Trinath was not weakened by its retraction. Even so, the approver and Trinath were, according to both their statements, working together on the day of the murder when they were summoned by the appellant to take part in the crime; they were arrested on the following day so they had had a day, in which they must have appreciated that they were under suspicion, in which to arrange their story. After their arrest they were for some two days in police custody before they were sent up together, and with other accused, to the magistrate to have their confessions recorded, and there is no evidence that they were kept apart during this period. In that state of the evi-

dence it is impossible to say that the approver and Trinath were kept apart from each other, and that their previous concert was highly improbable. Sir Valentine Holmes has relied strongly on the case *In Re B. K. Rajagopal* [2] in which the court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused. Their Lordships whilst not doubting that such a conviction is justified in law under s. 133 of the Evidence Act, and whilst appreciating that the concidence of a number of confessions of co-accused all implicating the particular accused, given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver. This tendency to include the innocent with the guilty is peculiarly prevalent in India, as judges have noted on innumerable occasions, and it is very difficult for the court to guard against the danger. An Indian villager is seldom in a position to produce cogent evidence of alibi. If he is charged with having taken part in a crime on a particular night when he was in fact asleep in his hut, or guarding his crops, he can only rely, as a rule, on the evidence of his wife, members of his family, or friends to support his story, and their evidence is interested and not likely to carry weight. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. This aspect of the matter was well expressed by Sir George Rankin in *Ambica's* case [3].

2. [1943] M. W. N. 793 : Cr. 181 : I. L. R. 1944 Mad. 308

3. 35 C.W.N. 1274

In the present case their Lordships are in complete agreement with the judges of the High Court in declining to act upon the evidency of the approver supported only by the confession of Trinath. These two persons appear to have been nothing but hired assassins. They had ample opportunity of preparing their statements in concert, and, in addition, the approver has sworn to two contradictory stories, and Trinath has denied that his confession was true. It is true that no motive is shown for their falsely implicating the appellant, but motive is often a matter of conjecture. It may be that these two men thought it advisable to say falsely that they were acting on the instigation of another rather than on their own initiative, or they may have had reasons of their own for wishing to conceal the name of the real instigator.

For the above reasons their Lordships are of opinion that the conviction of the appellant cannot stand.

— *Appeal allowed*

Cr. M. P. No. 400 of 1949

February 28, 1949

SATYANARAYANA RAO & VISWANATHA SASTRI, JJ.

OM PRAKASHA GUPTA
v.
THE KING

Cr.P.C. (V of 1898*) Ss.* 151 *&* 491*—Arrest under S.* 151—Habeas Corpus.

If a police officer arrests a person under s. 151 *Cr.P.C. it is not open to the High Court under s.* 491 *Cr.P.C. to go into the question whether in fact the police officer was justified in concluding that the person sought to be arrested was about to commit a cognizable offence and whether the police officer was equally justified in concluding that there were no other means by which the perpetration of the offence could have been prevented.*

An arrest under s. 151 *Cr.P.C. is not illegal or improper within s.* 491 (*b*) *Cr.P.C.*

Petition under s. 491 Cr.P.C., 1898 praying that in the circumstances stated therein the High Court will be pleased to issue a writ in the nature of Habeas Corpus to produce the

body of the petitioner herein before the High Court and direct that he be set at liberty.

S. Sursaprakasam, for Petr.
Crown Prosecutor (*S. Govind Swaminathan*) for Crown.

ORDER.
[SATYANARAYANA RAO, J.]

This is an application under S. 491, Criminal Procedure Code to issue an order in the nature of *habeas corpus* to produce the body of the petitioner who is now in the custody of the Commissioner of Police, Madras, and to set him at liberty.

The petitioner was arrested by the Inspector of Police, Intelligence Section, Madras City Police, on 22nd February 1949 and was produced by him before the Commissioner of Police on 23rd February 1949 and was remanded to custody for a period of ten days. The arrest as appears from the affidavit filed by the Inspector of Police was made under S. 151 of the Criminal Procedure Code. That section reads as follows :

> "A police officer knowing of a design to commit any cognizable offence may arrest, without orders, from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented."

This section, it must be noted, occurs in the chapter, headed "Preventive Action of the Police", and was designed to prevent the commission of offences by arresting the person beforehand.

The contention urged on behalf of the petitioner is that the arrest under S. 151 Criminal Procedure Code is illegal as the police officer had no information or facts before him to conclude that the petitioner entertained a design to commit a cognizable offence, and, further, that it was possible for the police officer to have prevented the commission of an offence by other methods. The affidavit of the Inspector of Police filed today clearly states that the Commissioner of Police received instructions from the Superintendent of Police, Special Branch, C. I. D., Madras, under instructions from the Deputy Commissioner of Police, Special Branch, Bombay, to arrest the petitioner under S. 151 of the Criminal Procedure Code. He adds that after satisfying himself that the petitioner was designing to commit a cognizable offence, he had arrested the petitioner on 22nd February 1949 and produced him before the Commissioner of Police on 23rd February 1949 who remanded him to custody. The section, it will be seen, authorises a police officer to arrest if he had knowledge that the person sought to be arrested entertained a design to commit a cognizable offence, it must also further appear to the police officer that the commission of the offence could not be otherwise prevented. Both the "knowledge" and "the appearance" are those of the police officers concerned and are not capable of an independent investigation. If the police officer had authority under s. 151 of the Criminal Procedure Code to arrest the petitioner, which undoubtedly he has, it is not open to this court exercising its jurisdiction under s. 491 to go into the question whether, in fact, the police officer was justified in concluding that the person sought to be arrested was about to commit a cognizable offence and whether the police officer was equally justified in concluding that there were no other means by which the perpetration of the offence could have been prevented. The discretion is vested solely in the police officer and that discretion cannot be questioned or canvassed in a proceeding under s. 491 of the Criminal Procedure Code. The object of the section is to prevent the commission of an offence which a person designs or intends to commit. The facts are not capable of investigation in order to find out whether, in fact, a cognizable offence was intended to be committed or not, as the offence would still be at the stage of an intention and has not passed into the region of facts. There is nothing therefore on the face of the record to show that the arrest was illegal or improper within the meaning of s. 491 (1) clause (b) of the Criminal Procedure Code.

It was also contended on behalf of the petitioner that the proper procedure for the police officer was to have followed the procedure laid down in s. 54 (ix) of the Criminal Procedure Code, and that if he had followed it, the requisition would have shown the person intended to be arrested as well as the offence or other causes for which the arrest was to be made. It is unnecessary for us to consider whether, on the facts as disclosed in the affidavit, it would not be a case also falling under that section. All that we are now concerned

here is whether the custody of the petitioner is illegal or not. On the face of these proceedings, as stated already, there is nothing to indicate that the detention or custody of the petitioner is illegal or improper. For these reasons, we dismiss the petition.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 546 of 1948
(Cr. R. P. No. 514 of 1948)

March 16, 1949

SOMASUNDARAM J.

I. V. SUBBA RAO
v.
THE KING

Prevention of Corruption Act (II of 1947), s. 6 —Sanction — Validity — Criminal trial — Lacuna in prosecution—Evidence in revision.

Where the sanction to prosecute a public servant on the face of it does not contain the facts constituting the offence charged nor is there any evidence given that those facts were placed before the sanctioning authority, the sanction is not valid.

Where there has been serious lacuna in the prosecution, it is not advisable to allow the prosecution to fill in the lacuna in the revisional court by letting in evidence.

Petition under ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the Court of Session of the East Godavari Division in C.A. No. 27 of 1948 preferred against the judgment of the court of the Additional I Class Magistrate Kakinada in C. C. No. 451 of 1947.

C. A. Vaidyalingam & K. Ramachandra Rao, for Petr.
Public Prosecutor (V. L. Ethiraj), for Crown

ORDER

In this case the petitioner has been convicted under s. 161 I. P. C. and sentenced to one and a half months rigorous imprisonment by the Additional First Class Magistrate, Kakinada; it was confirmed on appeal by the Sessions Judge of East Godavari.

The petitioner who was a station master at Dwarapudi was chargesheeted by the Special Police Establishment for having accepted an illegal gratification of Rs. 10 on 23rd April 1947 from P.W. 2 for booking two iron machinery parts to Bezwada. It is unnecessary to go into the details of the case as the main point on which the revision was argued is one of sanction. The sanction which is required for prosecuting the petitioner under Act II of 1947 is contained in Ex. P-4 which is as follows :

Madras.
22nd July 1947.

No. P. 426.

To the Deputy Superintendent of Police.
Special Police Establishment,
Vepery, Madras.

Dear Sir,

Reference—I. V. Subbarao—Station-master, Dwarapudi.

With reference to your letter C. No. 437/SPE/M/47 of the 4th instant, sanction is accorded to prosecute the abovenamed.

Yours faithfully,
(Signed)———;
Chief Commercial Manager."

The letter referred to in that sanction has not been filed in Court; nor the facts on which the sanction was obtained spoken to by the Inspector in this case. No evidence has been let in to show what facts were placed before the sanctioning authorities for the purpose of obtaining sanction. In *Gokulchand Dwarkadas Morarka* v. *The King* [1] their Lordships of the Privy Council have held that it must be proved that the sanction was given in respect of the facts constituting the offence charged and it is plainly desirable that the facts should be referred to on the face of the sanction; but if it is not so shown, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. Sanction to prosecute is a matter of importance which constitutes a condition precedent to the institution of the prosecution and the Government have absolute discretion to grant or withhold the sanction and they held in that particular case that the sanction which was in terms similar to the one given here was not a valid one. In this case, as already stated, the sanction on the face of it does not contain

1. [1948] M.W.N. 292 : Cr. 56

the facts constituting the offence charged nor was there any evidence given that those facts were placed before the sanctioning authority. I called for a report from the lower Court whether the letter referred to in the sanction letter was filed in evidence in Court. The report is that the letter does not seem to have been filed or produced in Court. The Public Prosecutor applied to let in evidence of that letter in this Court but I do not think that in a matter in which there had been such serious lacuna in the prosecution it is advisable to allow it to fill in the lacuna in the revisional Court by letting evidence here. The sanction in this case is on all fours with the sanction in the Privy Council case. Following therefore the ruling of the Privy Council, I hold that in this case there has been no valid sanction and the lower Court has therefore no jurisdiction to take cognisance of the offence. The conviction and sentence of the petitioner are set aside and he is acquitted.

N.T.R. — *Petition allowed*

Cr. App. No. 350 of 1948

November 24, 1948

RAJAGOPALAN, J.

THE PUBLIC PROSECUTOR
v.
A. K. GOPALASWAMI PILLAI

Arms Act (XI of 1878*), s.* 22*—Delivery—What amounts to.*

The 'delivery' which is punishable by s. 22 *Arms Act must be a conscious delivery. It need not necessarily be a physical delivery in that there must be proof that the accused delivered with his own hands the gun in question to another; but from the circumstances of the case the only possible inference must be that the gun in question was delivered.*

Merely because a person leaves in a house of his, which is temporarily leased to another, a gun it cannot be inferred that the gun was delivered to the tenant for his use.

Appeal under s. 417, Cr. P. C., 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sessions Judge of East Tanjore Division at Nagapattinam in Cr. App. No. 35 of 1948 on his file, dated 12-4-1948, preferred against the Judgment of the Court of the Additional First Class Magistrate, Nagapattinam in C. C. No. 29 of 1948.

Asst. Public Prosecutor (A. S. Sivakaminathan), for Applt.

P. Basi Reddi & P. Rajamanickkam, for Respts.

JUDGMENT.

The appellant was licensed to possess and use a D. B. B. L. gun which bore the number 75710. The accused had two houses, one in which he lived and the other in which apparently he kept his gun. The gun itself appears to have been kept in a gun case and the gun case was kept in an almyrah in the house at the rear. It was common ground that on the day the police searched the rear house it was in the possession of one Kolandavelu. What other objects were traced to the possession of Kolandavelu we are not concerned with in this case. The police found the D. B. B. L. gun in the open gun case in the almyrah with its doors closed but not locked. The only other article declared to have been found in that almyrah was M. O. 2 but whether M. O. No. 2 belonged to Kolandavelu or to anyone else there was nothing in evidence to indicate. The learned First Class Magistrate convicted the appellant under S. 22 of the Arms Act with having delivered the gun to Kolandavelu who admittedly had no licence to possess or use a fire arm of that kind. On appeal the learned Sessions Judge acquitted the appellant holding that there was no proof of delivery as such within the meaning of S. 22 of the Indian Arms Act. Against that order of acquittal the Government have preferred this appeal.

I see no reason to differ from the learned Sessions Judge. What S. 22 punishes is "delivery". It must be a conscious delivery. It need not necessarily be a physical delivery in that there must be proof that the accused delivered with his own hands the gun in question to Kolandavelu; but from the circumstances of the case the only possible inference must be that the gun in question was delivered. All that the prosecution was able to prove was that the gun disjointed, in an open gun case, was found in an almyrah in the house in possession of Kolandavelu. There was nothing to show that Kolandavelu knew what were the contents of the almyrah, the doors of whih were closed though not locked. There was nothing in evidence to indicate that Kolandavelu had the use of the almyrah with

the express or implied permission of the accused. To reiterate there was nothing to indicate to whom M. O. No. 2 belonged. There was nothing to indicate that the accused could not go into the house and take possession of the gun whenever he wanted. Kolandavelu apparently lived alone; and if the evidence of D. W. 2 is to be accepted Kolandavelu arrived in that house and took possesion of it only the evening before the search. Merely because a person leaves in a house of his which is temporarily leased to another the articles belonging to him, from that factum alone it cannot be inferred that these articles were delivered to the tenant for his use. That was all that the prosecution was able to prove with reference to the gun in question. The learned sessions judge was right in his view that the evidence on record did not disclose the delivery contemplated by S. 22 of the Arms Act. The appeal is dismissed.

N.T.R. — *Appeal dismissed*

Cr. R. C. No. 348 of 1949

Cr. R. P. No. 298 of 1949

March 23, 1949

SOMASUNDARAM J.

L. PAPAYYASWAMY

v.

THE KING

Penal Code (XLV of 1860*), S.* 465*—Offence under—Jurisdiction.*

Where the petitioner intended to use forged documents as genuine before the Madras Public Services Commission and with that object he posted his application with the forged documents at Vizagapatam, the real user of the documents comes in only when the Services Commission looks into the application and considers it and the court at Madras has jurisdiction to try the petitioner for offences under Ss. 465 *and* 465 *read with s.* 471 *I. P. C.*

Petition under Ss. 435 and 439 Cr.P.C. 1898, praying the High Court to revise the judgment of the Fifth Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras dated 17-2-49 in C. C. 1128 of 1948.

Vepa P. Sarathi & E. H. Bagiratha Rao, for Petr.

Crown Prosecutor (*S. Govind Swaminathan*), for Crown.

ORDER.

This is a petition to quash the charge on the ground that the court has no jurisdiction. The facts of the case are these.

The petitioner has been prosecuted for having used three documents along with his application to the Madras Public Services Commission for admission to a competitive examination. The three documents are said to be forged documents. They were posted at Vizagapatam on 17th July 1947 along with his application and received in the office of the Public Services Commission on 21st July 1947. After examining eight prosecution witnesses the lower court has framed charges against the petitioner for the offences under s. 465 and s. 465 read with s. 471 Indian Penal Code.

It is contended by the learned counsel for the petitioner that these documents along with his application having been posted at Vizagapatam the offence of using forged documents is complete at Vizagapatam and therefore the only court which has territorial jurisdiction for trying the petitioner for the offences of which he is charged is the court at Vizagapatam and not the fifth Presidency Magistrate's court at Madras.

The question really is where were these documents used. There is no doubt that the petitioner intended to use these documents as genuine before the Madras Public Services Commission and with that object he posted his application along with the forged documents at Vizagapatam. The real user of the documents comes in only when the Madras Public Services Commission looks into the application and considers it. It is open to the petitioner to withdraw his application even before it is considered by the Public Services Commission. Then it cannot be said that he used the forged documents with the Madras Public Services Commission as genuine. In this case he has not done so. As stated already the real user comes in only when the application is considered by the commission at Madras and it has been considered there. The offence of using forged documents as genuine is, therefore, committed at Madras. I hold that the Presidency Magistrate's court has jurisdiction to try the petitioner for the offences charged.

The petition is dismissed.

N.T.R. — *Petition dismissed*

Cr. M. P. Nos. 442 to 447 of 1949
April, 5, 1949
SATYANARAYANA RAO & VISWANATHA SASTRI, JJ.
P. RAMIAH & others
v.
THE CHIEF SECRETARY TO THE GOVERNMENT OF MADRAS & another

Maintenance of Public Order Act (Mad. Act I of 1947), *Ss.* 2 (1) (*a*) *&* 15—*Delegation by Provincial Government—If Government can pass order — Activity of person outside Province—If proper material.*

The delegation of power in G.O. No. Ms. 907 *dated* 21-3-1947 *under S.* 15, *Maintenance of Public Order Act does not preclude the Provincial Government from itself passing an order of detention.*

The activity of persons whose detention is contemplated outside the Province can be taken into consideration to justify the action under S. 2 (1) *of the Act so long as it is proximate enough in date.*

Petitions under s. 491 Cr.P.C., 1898, praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue directions in the nature of a *habeas corpus* directing the 2nd respondent to produce the petitioners before the High Court, to be dealt with according to law and direct that they may be set at liberty.

V. G. Row for Messrs. Row & Reddy, for Petrs.

Crown Prosecutor (*S. Govind Swaminathan*), for Crown.

ORDER

[SATYANARAYANA RAO, J.]

The applicants in all these applications are Indians who were living in Malaya for some years, and as they were engaged in Malaya in Communist activities, the Malayan Government seems to have detained some of the important leaders under the Malayan Emergency Regulations. But as they are Indian nationals, the Malayan Government released them and repatriated them. The applicants along with others arrived in India by S. S. Vasna in November 1948. Immediately after their arrival, on the 19th November 1948 they were arrested by the police in Madras and were detained in custody. They were later produced before the Commissioner of Police, Madras, who remanded them for 9 days, and the period of remand was later extended by a further order. On 30-11-1948 orders of detention under Madras Act No. I of 1947 were passed by His Excellency the Governor of Madras under s. 2 (1) of the Act directing the detention of the applicants in the Central Jail, Vellore. The grounds of detention were served on these applicants on 24—12—1948, and they submitted their representations to the Government on 7—1—1949. The matter does not seem to have received the attention of the Advisory Council, and the Government has not yet passed final orders under s. 3 (5) of the Act.

The grounds of detention of the applicants in all the cases are substantially the same. The learned advocate for the applicants contended that His Excellency the Governor of Madras had no power to pass an order of detention under s. 2 (1), as His Excellency had already delegated the powers conferred on the Provincial Government by s. 2 (1) (a) of the Act to the District Magistrates or the Commissioner of Police, Madras as evidenced by G. O. No. Ms. 907 dated 21—3—1947, and that the proper authority to have passed an order of detention under the Act was the Commissioner of Police, Madras and not His Excellency the Governor of Madras. Secondly it was argued that the grounds of detention are vague and indefinite, and that, in any event, the activities of the petitioners which were outside the Province of Madras should not have been taken into consideration in arriving at the satisfaction under the Act that they were acting or about to act in a manner prejudicial to public safety or the maintenance of public order.

S. 15 of Madras Act I of 1947 empowers the Provincial Government by order to direct that any power or duty conferred upon the Provincial Government be exercised or discharged by any officer or authority subordinate to the Provincial Government. One of the powers exercisable by the Provincial Government under the Act is the power to pass an order of detention under s. 2 (1) of the Act. G.O. No. Ms. 907 dated 21-3-1947 empowered the District Magistrates and Commissioner of Police, Madras, within their respective jurisdictions to exercise the power conferred on the Provincial Government by s. 2 (1) (a) of Act. It is in these terms :

"In exercise of the powers conferred by s. 15 of the Madras Maintenance of Public Order Act, 1947 (Madras Act I of 1947), His Excellency the Governor of Madras hereby directs that the powers conferred on the Provincial Government by s. 2 (1) (a) of the said Act shall be exercised also by all

the District Magistrates and the Commissioner or Police, Madras, within their respective jurisdictions.

(By Order of His Excellency the Governor.)"

The contention urged on behalf of the applicants is that when once a transfer of the power was effected by virtue of the power of delegation conferred under s. 15 upon the Provincial Government, the Provincial Government had no further power to exercise that particular power which has been so delegated and in support of this proposition a passage from the judgment of the Judicial Committee in *Emperor* v. *Sibnath Banerji* [1] was relied on. Referring to sub-sec. (5) of s. 2 of the Defence of India Act, the Judicial Committee therein observed :

> "Their Lordships would also add, on this contention, that sub-sec. (5) of s. 2 provides a means of delegation in the strict sense of the word, namely, a transfer of power or duty to the officer or authority defined in the sub-section with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under s. 49 (1) of the Act of 1935, the Governor remains responsible for the action of his subordinate taken in his name."

This passage in the judgment of the Judicial Committee, in our opinion, refers to the manner and the mode of delegation contemplated by sub-section (5) of s. 2 of the Defence of India Act. It is not authority for holding that, where under a power of delegation permitted under an Act, the transfer of the power is circumscribed and is restricted in the manner in which we find in the G. O. now under discussion, the Provincial Government is absolutely prohibited from exercising the power so transferred. In the present case, the Government Order makes it clear that the District Magistrates and the Commissioner of Police, Madras were also empowered to exercise powers under s. 2 (1) in addition to the Provincial Government. It is not an absolute transfer by the Provincial Government of the power to pass an order of detention under s. 2 (1) of the Act but a partial delegation or transfer of its power which is not prohibited by s. 15 of the Act. S. 15 itself lays down that the transfer may be effected in such circumstances and under such conditions as may be specified in that direction. In view of this language of the section it would be perfectly open to the Provincial Government to say that they would not part with the power under s. 2(1) entirely and would reserve to themselves a part of it. Of course, in the case of the same person the Provincial Government and the Commissioner of Police at Madras cannot exercise the power of detention under s. 2(1) of the Act. But there is nothing in the provision of the Act to limit or restrict the authority of Provincial Government to delegate its powers in the manner in which it was effected in the G.O. above referred to. The observations of the Judicial Committee must be taken to be confined to cases where the actual wording of the delegation is not restricted in its scope but is absolute. This view of the Government Order is really sufficient to dispose of this aspect of the case.

We are however of opinion that in cases where a statute authorises an authority to delegate its power or duty, the principles laid down by Coleridge, C.J. and Wills, J. in *Huth* v. *Clark* [2] would be more apposite than the observations of Scott, L.J. in the decision in *Blackpool Corporation* v. *Locker* [3]. In *Huth* v. *Clark* [2], under the Local Government Act of 1888, an executive committee of a county council was authorised to appoint a sub-committee or sub-committees and delegate to them all or any of the powers of the executive committee with or without restrictions and from time to time to revoke or alter any such delegation. The point raised was whether after this delegation the executive committee of the county council could exercise the power under the Act notwithstanding the fact that there was a delegation of the power to the sub-committee. The argument raised in that case was that delegation implied a denudation of the power and authority, and that therefore the executive committee had no right to exercise the power. Coleridge, C. J. answered the contention thus;

> "But delegation does not imply a denudation of power and authority; the 6th schedule of the Act provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word 'delegation' implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given. Unless, therefore, it is controlled by statute, the delegating power can at any time resume

1. [1945] M.W.N. 546 : Cr. 94
2. [1890] 25 Q B D 391
3. [1948] 1 K B 349

its authority. Here the executive committee has exercised the power which the sub-committee might have exercised—but did not—and no question of conflict of jurisdiction arises".

Wills, J. considers the legal import of the word "delegation" and he observes at page 395:

"Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.......The notion, therefore that the use of the word "delegate" implies that the executive committee parted with their own authority is misconceived".

In view of this authority of Coleridge C. J. and Wills, J. even if the language of the G. O. were otherwise, we think that merely because the Commissioner of Police is authorised by the Provincial Government by virtue of s. 15 of the Act to exercise the power under s. 2 (1), the Provincial Government is not deprived of that power. The decision of the Court of Appeal in *Blackpool Corporation* v. *Locker* [3] on which reliance was placed by the learned advocate for the applicants does not conflict with the decision in *Huth* v. *Clarke* [2]. The point was considered only by Scott, L. J., and Evershed, L. J. did not think it necessary to consider the question in the view he took of the case. The observations of Scott, L. J. dealing with the interpretation of Regulation 51 of Defence (General) Regulations, 1939, particularly clause 5, proceeded on the assumption that what the Lord Justice was called upon to consider was the effect of delegated legislation and not a case of delegation of a power or duty under an Act. We are not now concerned here with a case of delegated legislation, and therefore we think that the dicta of Scott, L. J. in *Blackpool Corporation* v. *Locker* [3] are not applicable, and we prefer to follow the decision in *Huth* v. *Clarke* [2] which is more in point.

We have perused the grounds in all these cases, and we do not agree with the contention strongly pressed on behalf of the applicants that the grounds are indefinite and vague. It was definitely stated in the grounds that these people were members of the Communist Strong Arms Intimidation squad of the Singapore Harbour Labour Union; that a special feature of this group of Communists was that they have been noted for their violence lately seen in the beating and stabbing of Chinese labourers during the strike; that these applicants were members of the Singapore Harbour Labour Union Thonder Padai; and that they took active part in intimidating labourers under the orders of the Communist leaders of the Union. In case of some of the applicants there were also further grounds. These grounds cannot be said therefore to be indefinite or vague.

The argument that it is not open to the detaining authority to take into consideration the activities of the applicants outside the Province in arriving at the satisfaction contemplated by S. 2 (1) of the Act is, in our opinion, unsound. The person against whom action was proposed under S. 2 (1) at the time of the order was within the Province of Madras. The detaining authority had before it material to reach the satisfaction that the person is likely to act in manner prejudicial to public safety or the maintenance of public order. The basis for this satisfaction was the activity of the person concerned in Malaya, and his activity therefore certainly would be proper material for consideration under S. 2 (1) of the Act in coming to a conclusion whether the person of that description would or would not act in a manner prejudicial to public safety or the maintenance of public order. The Act applies to the whole of the Province, and the danger contemplated was the danger to the public safety and maintenance of Public order of this Province. The antecedent history of the person—whether he lived in Malaya or elsewhere it does not matter—so long as it was proximate enough in date, if it is such as to produce the satisfaction in the mind of the detaining authority that the person concerned was likely to act in a manner prejudicial to public safety and the maintenance of public order, will be perfectly relevant material under the section. We see no objection for taking into consideration under S. 2 (1) of the Act the activity of the person outside the Province to justify action under S. 2 (1) of the Act.

For these reasons we are of opinion that the orders of detention of the applicants are legal, and that no interference is called for. The applications are dismissed.

N.T.R. — *Petitions dismissed*

Cr. R. C. Nos. 324 & 343 of 1948
Cr. R. P. No. Nil & 313 of 1948.
April 20, 1949.
SOMASUNDARAM, J.
SHEIK KHADER SAHIB & another
v.
THE KING.

Evidence Act (I of 1872), S. 27—Admissibility under—Extent.

The extent of the statement admissible under S. 27 Evidence Act does not depend upon whether the extent serves to corroborate or not the other evidence in the case. The only limitation is that the extent must relate distinctly to the facts discovered, subject to its relevancy being proved by other evidence.

Petitions under ss. 435 and 439 Cr.P.C. 1898 praying the High Court to revise the order of the court of the Sub Divisional Magistrate, Cuddapah in C. A. Nos. 2 and 1 of 1948 respectively (C. C. No. I of 1947), Stationary Sub-Magistrate, Cuddapah).

V. Rajagopalachari, R. Ramalingareddi & V. V. Raghavan, for Petrs.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

JUDGMENT

Accused 3 and 1 are the petitioners respectively in the above cases. They were convicted and sentenced to rigorous imprisonment for six months by the Stationary Sub Magistrate, Cuddapah for an offence under S. 411 I.P.C. In appeal, the Sub Divisional Magistrate, Cuddapah, confirmed the convictions and sentences.

On 27-11-1946 between 7 and 8 P.M., there was a theft of gold and diamond jewels, cash and other properties of the value of about Rs. 10,000 in the house of one Rao Sahib K. Venkatesam Chetti in Cuddapah town. The Circle Inspector of Police on receipt of information, investigated the case. In the course of the investigation, he recovered M. Os. 1 to 4 from the tank bund on 28-11-1946. The next day he had the tank searched as a result of which he recovered M.Os. 5 to 38. He suspected the first accused who was traced and arrested on 18-12-1946 and he made a statement in consequence of which M.Os. 39 to 62, 72 to 82, 85 and 86 were recovered from a pit adjoining the pial of the house of accused 3. Accused 3 was then arrested and on information furnished by him, M.Os. 63 and 64 were recovered from a pit under a flower pot in the backyard of his house. A search of his house resulted in the recovery of a small tin, M. O. 83 containing Rs. 382-8. He was then taken to the police station and there he made a further statement in consequence of which M. Os. 65 to 71 were recovered from a pot buried in a corner in the kitchen of accused 3. The properties were later identified by P. W. 1 as his. The case against the petitioner rests mainly on the statements made by them under s. 27 of the Indian Evidence Act and the consequent recovery of the stolen articles.

The statement attributed to the first accused and admitted by the lower Court is as follows:

> "On 27—11—1946, i.e. the second day of Moharram I brought out a trunk from the residence of Rao Sahib P. Venkatesam Chetty at about 7-30 in the evening. I bundled the jewels that were in the trunk in a cloth and I buried that cloth bundle by the side of the pial of Khadar Sahib in a pit. I will show you the spot."

Accused 3, as already stated, made two statements. The portions admitted by the lower Court are:

> (a) "I dug out the pit to find out what it contained and found a number of jewels. I took out one gold pannir buddi and one gold kadiam, set with stones from among the jewels and kept back the bundle in the pit. I buried the gold pannir buddi and the hand kadiyam in my backyard under a flower pot in a pit. I will point out the spot".
>
> (b) "I took some more jewels from the place where Beehu concealed them in addition to gold panniru buddi and gold kadiam. I buried them in my house in one corner of the kichen. I will point out the place".

On the above two statements by the two petitioners they were convicted and sentenced as aforesaid. The only point in revision is whether the statements admitted by the lower Court are admissible and if not, to what extent they are admissible. According to the Full Bench decision of our High Court in *Athappa Goundan In re* [1], the whole of the above statements will be admissible. But that decision has been overruled by the Judicial Committee in *Kotayya* v. *King Emperor* [2] in which their Lordships said that "in their Lordships' opinion *Athappa Goundan In re* [1] was wrongly decided". In the Privy Council case, the statement that was admitted by the lower court was this:

1. [1937] M W N 442 : Cr. 74 : I L R 1937 Mad 695 F B
2. [1947] M W N 217 : Cr 45 : I L R 1948 Mad I P C

"About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We all beat Boddupati China Sivayya and Subbayya to death. The remaining persons Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hand. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pullukuri Kotayya."

Their Lordships held that the whole of the statement except the passage,

"I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come",

is inadmissible. There was a confessional statement made by accused 3 in that case which was deposed to by the Police Sub-Inspector who said that accused 3 said to him:

"I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place."

Their Lordships referring to this, said :

"The first sentence must be omitted. This was followed by a mediatornama, Exhibit Q-1 which is unobjectionable except for a sentence in the middle, 'He said that it was with that spear that he had stabbed Modupatti Sivayya' which must be omitted".

This decision of the Privy Council has been referred to and followed by a Bench of this Court in the *Public Prosecutor* v. *Oor Goundan* [3] in which it has been held that the statement

"I have buried in the margin of the eastern ridge of my sugar cane garden the knife. If you come with me I shall take and give it,"

is admissible.

It is now contended by Mr. Rajagopalachari, learned counsel for the petitioner, that the Judicial Committee and the Bench of this Court admitted portions referred to in their decision because they were, to use the phrase of the learned counsel, 'innocuous'. He relied strongly on the enunciation of the principles laid down earlier by their Lordships on the construction of s. 27. Their Lordships state:

"On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section."

I entirely agree with the learned counsel that s. 27 should not be construed so as to lift the ban imposed by the two preceding sections. At the same time I do not agree with him when he states that the Privy Council admitted and intended to admit only those portions which are innocuous as admissible under s. 27. In the Privy Council it was contended on behalf of the Crown that the "fact discovered" is a physical object produced and that any information which relates distinctly to that object can be proved. Their Lordships did not agree with that contention and pointed out;

"It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact."

They further observe as follows :

"Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant."

In the end their Lordships have held as already stated, that the statement, "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is admissible. The spear and the stick will be relevant only when they are proved by other evidence to have been used in the commission of the offence. Similarly, the Bench of this court has held in *The Public Prosecutor* v. *Oor Goundan* [3] that the statement

"I have buried in the margin of the eastern ridge of my sugar cane garden the knife. If you come with me I shall take and give it"

is admissible. In *Vellingiri* [4] Rajagopalan J. has held that the statement "I sold the (dynamo) to the proprietor of a soda factory near the Pillaiyar Temple in Anuppalayam for Rs. 15" is admissible. No doubt he also observes :

"Earlier in point of time was the statement of the accused that he had sold it. That the accused sold it to P. W. 4 was the fact deposed to by P. W. 4. The question is, was it the accused's statement that led to

3. [1948] M.W.N. 60: Cr. 12

4. Cr.R.C. No. 477 of 1948

the discovery of the sale by the accused to P.W. 4? That was a fact discovered by the Sub Inspector as a result of the statement in Ex. P-3 though proof of it in court came only subsequently with the statement made on oath by P.W. 4.

It is the contention of Mr. Rajagopalachariar that in the above case the statement that "I sold etc." was admitted because P.W. 4 subsequently spoke to the same and that the statement of the accused was only used to corroborate P.W. 4's evidence. I do not think that Rajagopalan J. intended that "I sold etc." is admissible because P.W. 4 spoke to the same. The extent of the statement admissible under s. 27 does not depend upon whether the extent serves to corroborate or not the other evidence in the case. The only limitation is that the extent must relate distinctly to the facts discovered subject to its relevancy being proved by other evidence. The burial of the jewels by the accused in the pit becomes relevant only when the jewels are proved to be stolen property. The statement "I buried the cloth bundle by the side of the pial of Khadar Sahib in a pit. I will show you the spot" by itself is innocuous. It is no more harmful than "I hid it (spear) and my stick in the rick of Venkatanarasu in the village. I will show you if you come" which is admitted by the Privy Council as the portion admissible. It is only when the spear or the stick is proved to have been used in the commission of the offence the fact discovered is relevant. Similarly only when the jewels are proved to be stolen, their burial in the pit by the accused becomes relevant. I therefore hold the following portions as admissible; as regards accused 1: "I burried that cloth bundle by the side of the pial of Khadar Sahib in a pit. I will show you the spot." As regards accused 3:

> "I buried the gold panniru buddi and the hand kadiam in my backyard under a flower pot in a pit. I will point out the spot:" "I buried them (some more jewels) in my house in one corner of the kitchen. I will point out the place."

If the statements to the extent above mentioned are admissible, then they clearly prove that the accused were in possession of the stolen articles and they have not satisfactorily accounted for their possession. The conviction and sentence are therefore confirmed and the petitions are dismissed.

N.T.R. — *Petitions dismissed*

Cr. R. C. Nos. 146 & 147 of 1948

November 19, 1948

RAJAGOPALAN, J.

Medisetti BENNIAH

v.

THE KING

Madras Kerosene Control Order (1935), R. 12 *— Retail dealer — Who is — Kerosene, if essential commodity under Act XXIV of* 1946.

Kerosene is petroleum product and therefore an essential commodity within Central Act XXIV of 1946.

A retail dealer is a dealer who sells kerosene to the consumers. Where the petitioner obtained tins of kerosene on several occasions and sold them to the consumers in the village,

Held, *he was a retail dealer within the meaning of the Control Order.*

Petitions under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of Session of Vizagapatam in C. A. Nos. 72 and 73 of 1947 (C.C. Nos. 25 to 27 of 1947 and 28 of 1947 respectively on the file of the Additional I Class Magistrate, Vizagapatam).

E. Venkatesam, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The same question arises for consideration in both these petitions. The petitioner was the village munsif of Pakalapadu. He was certainly not granted any licence; nor was he registered as a retail dealer of kerosene within the meaning of Rule 12 of the Madras Kerosene Control Order, 1945. C. W. 1 was the registered dealer for the supply of kerosene to the residents of the village of which the petitioner was the village munsif. The facts proved were that it was the practice in the villages, to which C. W. 1 was expected to supply kerosene, for C. W. 1 to issue kerosene to the village munsifs and the village munsifs paid for the kerosene they took from C. W. 1. The village munsifs then distributed the kerosene to the individual villagers. On 18—12—1946 C. W. 1 handed over to the petitioner seven tins of white kerosene and one tin of yellow kerosene. Under the orders promulgated by the District Magistrate, originally under s. 81 (2) of the Defence of India Rules, he fixed the retail price of a bottle of kerosene at 2 annas 9 pies for superior kerosene and 2 annas 6 pies for inferior kerosene. On 3-1-1947 the petitioner sold kerosene at 4 annas a bottle.

The charge against the petitioner was that he sold kerosene in retail without a retail dealers' licence in contravention of R. 12 of the Madras Kerosene Control Order and thereby committed an offence punishable under s. 7 of the Essential Supplies (Temporary Powers) Act XXIV of 1946. The other charge was that he sold kerosene at rates in excess of those prescribed by the Collector in his notification issued under the Defence of India Rules (Rule 81 (2)). The petitioner was convicted of these charges.

In the definition of "essential commodity" in s. 2 of Act XXIV of 1946 kerosene as such was not included, but petroleum and petroleum product were included. One of the contentions of the learned advocate for the petitioner was that kerosene could not be included within petroleum and petroleum products specified in s. 2 of the Act. Kerosene itself has not been defined nor mentioned in the Act, and in the absence of any statutory definition its ordinary meaning in English language will have to be taken. The Concise Oxford Dictionary gives the meaning of kerosene "lamp-oil obtained by distillation of petroleum and from coal and bituminous shale, paraffin". Even apart from that, it should be obvious that kerosene is a petroleum product, and so it comes within the scope of the definition of "essential commodity" in s. 2 of Act XXIV of 1946.

The main controversy centred on the question whether the petitioner was a retail dealer. The Madras Kerosene Control Order, 1945 defined "dealer" to mean "a person dealing in the purchase, sale or distribution of kerosene". "Retail dealer" was defined to mean "a dealer who sells kerosene to consumers". The contention of the learned advocate for the petitioner was that at the worst a village munsif who helped C. W. 1, the registered retail dealer, to distribute kerosene to the villagers in accordance with the quota fixed for the villages would be an agent, but in no case would the petitioner be a retail dealer within the meaning of the Madras Kerosene Control Order. C. W. 1 deposed:

> "Till January 1947 the accused, who is the V. M. of the village, used to take the village quota of kerosene for distribution in his village. In February 1947 and March 1947 I sold kerosene myself in Pakalapadu village. I cannot say what the accused used to do with the kerosene he was taking. Ex. C. is the account of sales of my shop".

Then C. W. 1 referred to the entry, Ex. C–1 and stated:

> "On 18–12–1946 the accused took 7 white and yellow kerosene tins and in token of receipt he signed in my account".

When cross-examined by the accused C. W. 1 stated:

> "The V. Ms. used to pay their cost. So also the accused paid me".

The learned advocate for the petitioner contended that there was no real evidence in this case that the transaction which resulted in the transference of kerosene tins from C. W. 1 to the petitioner was a sale. The evidence of C. W. 1 gives all the necessary ingredients to prove that each time there was a delivery of tins with payment of price therefor there was a transfer, and that transfer constituted a sale. It was in the account of sales, Ex, C., that these transactions were entered. There was nothing in the evidence to show that apart from the cost of the kerosene C. W. 1 was entitled to any more. Though there was no specific evidence when exactly the cost of the tins was paid by the village munsif to C. W. 1, there was still nothing in the evidence to indicate that after parting with the tins C. W. 1 retained any dominion over them, But it seems to me even without proof the transference of the tins to the village munsif by C. W. 1 constituted a sale, a sale to consumers by the village munsif would still make him a retail dealer within the meaning of the Madras Kerosene Control Order. A dealer means a person dealing in the sale or distribution of kerosene. Quite obviously the distribution to the villagers by the village munsif was for a pr'ce. It was certainly a sale. A retail dealer only means a dealer who sells kerosense to consumers.

One of the contentions of the learnd advocate for the petitioner was that it was not the regular business of the village munsif and that from the evidence on record it could not be said that he carried on business as a retail dealer within the meaning of rule 12 (a) of the Madras Kerosene Control Order. In *Re; Narayanaswami Mudali* [1] on which the learned advocate for the petitioner relied can have no application to the facts of this case. It was not an instance of a single transaction. Ex. C showed that the petitioner normally and on several occasions obtained tins of kerosene; and, as I have already pointed out, each transaction was a sale by C. W. 1 to the petitioner, who sold kerosene in retail to the villagers. On the evidence on record it can certainly be found that the accused carried on business as a retail

1. [1947] M W N 342 [1] : Cr 82

dealer; and he was not registered. The conviction under s. 7 for contravention of an order under rule 12 (a) of the Madras Kerosene Control Order was right and is confirmed.

That the petitioner sold in contravention of the orders of the Collector cannot be denied. Rules 1 and 2 prohibit the sale by any person; even assuming that the expression person as used in Rules 1 and 2 of the notification of the Collector must be interpreted as "dealer" which was the expression used in rule 3, in view of my finding that the petitioner was a retail dealer within the meaning of the Madras Kerosene Control Order, the contravention of the rules promulgated by the Collector was fully proved. The conviction on that count also was right.

The petitions are dismissed.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 303 of 1948
Cr. R. P. No. 274 of 1948
April 8, 1949
SOMASUNDARAM, J.
M. GANESAN
v.
THE KING

Motor Vehicles Act (*IV of* 1939). *S.* 116—*Penal Code* (*XLV of* 1860), *S.* 338—*Offence under. The driver of a motor vehicle who is guilty of a mere error of judgment is not guilty of an offence under S.* 116 *Motor Vehicles Act or S.* 338 *Penal Code.*

Petition under Ss. 435 and 439 Cr. P. C,. 1898 praying the High Court to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, Madras dated 3–3–48 in C. C. 3657 of 1947.

P. Basi Reddi, A. C. Muthanna & R. Ramachandra Reddi, for Petr.

Public Prosecutor (*V. L. Ethiraj*) *for Crown Prosecutor*, for Crown.

ORDER.

The petitioner in this case has been convicted by the Chief Presidency Magistrate of offences under s. 338 I. P. C. and s. 116 of the Motor Vehicles Act and sentenced to three months' rigorous imprisonment for the offence under s. 338 I. P. C. and one month rigorous imprisoument under s. 116 of the Motor Vehicles Act, the sentences to run concurrently.

The case relates to an accident which happened at about 11 a. m, on 22–10–1947 and the facts are these. On the day of the occurrence, a tram car proceeding towards Mylapore stopped at the tram stop opposite the Wellington Cinema. A bus M. S. C. No. 8751 was also going towards Mylapore. The petitioner was the driver of that bus. A head constable who was travelling in the tram was trying to get down through the front left passage of the tram. As he was attempting to alight keeping his legs on the foot board, the rear right side body of the accused's bus dashed against the foot board of the tram and as a result, the constable was injured in the leg. He was taken to the hospital and it was found that four bones in the left leg had been fractured. Ten days later he died on account of pneumonia and weak heart. According to the medical evidence, the injuries would not have been fatal but for the other two complications that the constable had. The injuries were therefore grievous in nature. The accident, as stated already, happened while the tram was stationary at the Wellington stop. It is in evidence that paint from the rear right side of the body of the bus was scraped to an extent of about one foot long and four inches broad and some paint from the bus was also found sticking to the left front side of the tram. At the time of the accident some hand carts laden with charcoal were going on the left side of the road in the same direction as the tram and the bus. The evidence is not quite clear at what distance from the tram these hand carts were going. But there is evidence that there was a line of cars parked on the left side of the road. On the evidence and according to the admission of the accused, the Chief Presidency Magistrate finds that "there was only just enough space for his bus to pass" and that "he should not have taken the risk of elbowing his way along the interspace. He did so at his risk, and if such a course should result in an accident, which really happened, he must answer for it".

In cases of accidents as pointed out by Mukherji J. in *Smith* v. *Emperor* [1]:

> "The difficulty is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. The prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision".

The task no doubt of keeping out the

1. [1926] 53 cal 333

prejudice is a difficult one but it has got to be performed. Keeping this observation of Mukerji, J. in mind, it has to be seen how far the petitioner in this case is guilty of the offences of which he has been convicted.

As stated already, the finding of the Chief Presidency Magistrate is that "there was only just enough space for his bus to pass" and that "he should not have taken the risk of elbowing his way along the interspace". The question is whether the act of the accused in the circumstances falls within the scope of the provisions of S. 116 of the Motor Vehicles Act and S. 338 I. P. C. I will first deal with S. 116 Motor Vechicles Act as in my view, if the petitioner is not guilty of the offence under that section, he would not be guilty of the offence under S. 338 I.P.C.

S. 116 of the Motor Vehicles Act runs as follows:

> "Whoever drives a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the place where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place, shall be punishable . . . . ."

This section is practically a reproduction of S. 11 of the Road Traffic Act, 1930 of England, which runs as follows:

> "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable . . . . ."

A reading of these two sections will show, that except for the words "If any person drives a motor vehicle on a road recklessly" word for word, S. 116 of the Motor Vehicles Act, is practically the same as S. 11 of the English Act. It is significant that the words "if any person drives a motor vehicle on a road *recklessly*" found in S. 11 of the English Act are omitted in the Indian Act. It is obvious therefore that driving a motor vehicle on a road recklessly, *per se* is not punishable under the Indian statute. Apart from this, under the English Act, there is another provision which makes careless driving punishable and it is found in S. 12 of that Act. That section is as follows:

> "(1) If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence."

There is no corresponding provision in the Indian Statute. The absence of a provision similar to S. 12 of the English Act is not without significance, particularly when our laws relating to motor traffic are modelled on English Statutes. The only inference that could be drawn from the absence of a provision in the Indian Statute similar to S. 12 of the English Act is that under the Indian law careless driving as such is not made punishable. The reasons for not introducing such a provision in the Indian Statute may be manifold; but it is unnecessary for me to go into that question. Suffice it to say that there is a distinction between dangerous driving mentioned in S. 11 and careless driving mentioned in S. 12 of the English Act both of which are made punishable under the English law, whereas under S. 116 of the Motor Vehicles Act, only dangerous driving is made punishable. Even reckless driving is excluded from the purview of S. 116. Apart from the class of cases which fall within the scope of Ss. 11 and 12 of the English Act, which may be stated to be (1) reckless driving (2) dangerous driving, and (3) careless driving there is a class of cases which fall under category of what is called "guilty of error of judgment". Acts which fall within the last class, viz. guilty of error of judgment, are not punishable. As it is not an offence it could not find a place in the statute book; but it is only laid down in decisions of English courts. In *John Joseph Howell* [2] on a trial for manslaughter, the Judge when dealing with a possibility of a conviction of dangerous driving, directed the jury: "If you think that (the prisoner) was guilty of a mere error of judgment, then you should find him not guilty." But when the foreman of the jury stated that the jury found the prisoner not guilty of manslaughter, the Clerk of the Assize asked him: "Do you find the prisoner guilty or not guilty of dangerous driving?" to which the jury replied: "Yes, we find him guilty of dangerous driving owing to an error of judgment." The Judge then asked whether they found him guilty or not guilty of dangerous driving and the foreman replied: "Guilty of dangerous driving." The Lord Chief Justice held that the jury meant to find that the

2. 27 Cr. App. Rep. 5

prisoner was guilty of a mere error of judgment and therefore was in no other sense guilty of dangerous driving. In paraphrasing the verdict of the jury the Lord Chief Justice stated as follows:

> "In other words, the jury meant to say: We know, when we look at the consequences and see the results of the event, that the driving was in fact dangerous, but, so far as the driver is concerned, we impute to him no more than a mere error of judgment."

The Lord Chief Justice then held that on that verdict, the accused was entitled to be acquitted and he was acquitted.

The question now in this case is under what category does the present case fall. It is clear from the evidence that the major portion of the bus had passed through and it is only the rear right side that hit the foot board of the tram. It is well known that when the front portion of the bus can pass through a passage, the rear portion also could pass through and unless something happens which turns the car or bus, there need be no occasion for the rear portion to touch any other body when the front portion had gone through without touching it. The finding of the Chief Presidency Magistrate also is to the effect that there was just enough space for the bus to pass. Only, according to him, he should not have taken the risk of elbowing his way along the interspace. In the circumstances, in my opinion the act of the petitioner falls properly within that class of cases, viz. guilty only of error of judgment. This is not a case where the petitioner acted "with the consciousness that the mischievous legal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent that happening." I should say that the petitioner thought that he could get the bus through the inter-space and the fact that the major portion of the bus went through the interspace without hitting against any alien body, supports him in his judgment. But if in spite of it this accident took place, he is not to blame. I therefore find the petitioner only guilty of error of judgment and not guilty of dangerous driving under S. 116 of the Motor Vehicles Act. If he is not guilty under this section, I do not see how he can be guilty under S. 338 I.P.C. I refrain from referring to the English decisions on this question as the Crown Prosecutor has fairly conceded in this case that it may be difficult to sustain a case under S. 338 I. P. C. I find him not guilty under S. 116 Motor Vehicles Act and S. 338 I.P.C. The convictions and sentences are set aside and the petitioner is acquitted.

N.T.R.

—

Cr. M. P. No. 1072 of 1946

August 31, 1948

GOVINDA MENON & MACK JJ.

G. NARAYANASWAMY NAIDU

v.

THE INSPECTOR OF POLICE MAYAVARAM & another.

Maintenance of Public Order Act (*Mad. Act I of* 1947), *Ss.* 2 (1) (*a*) & 15—*Mention of wrong section in order—Effect—Extension of Act — Prior delegation if enures—Order—Who should sign—Government of India Act,* 1935, *S.* 59 *(1).*

Where the detention order was only signed by the Chief Secretary to Government and did not on the face of it make mention that it was issued under the authority and by the order of His Excellency the Governor, held, *the defect was one of form and not of substance and in view of S.* 59 (1) *Government of India Act,* 1935, *was not invalid.*

It is not necessary to make mention of any particular section of the Act in the detention order. The mere circumstance that a wrong section is inserted in the order does not render the order invalid and cannot by itself be taken as leading to the conclusion that the District Magistrate did not bestow any attention to the action.

Where the Act has been extended, the delegation to the district magistrates made prior to the extension and which was very general, would enure so long as the Act was to be in force.

Petition under S. 491 Cr. P. C. praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *habeas corpus* directing the 2nd respondent to produce the petitioner before the High Court for being set at liberty.

A. K. Pillai for Messrs Row & Reddy & S. Krishnamurthy, for Petr.

Public Prosecutor (*V. L. Ethiraj*), for Crown

ORDER

[GOVINDA MENON, J.]

The Full Bench* has now decided that the powers of this court to interfere under s. 491 of the Criminal Procedure Code are strictly confined to the various categories enumerated in the judgment and unless any one of such categories exists, this court cannot interfere with an order of detention made by the Provincial Government. If the petitioner can bring his case within one of these instances, then according to the Full Bench, the detention is not one made in exercise of the powers conferred under the Act or in accordance with the provisions of the Act.

Mr. A.K. Pillai contends that the Provincial Government in ordering the detention of the petitioner was actuated by *mala fides* with the result that the third circumstance mentioned in the judgment of the learned Chief Justice can be invoked in his client's favour and that the petitioner is therefore entitled to be released. For this argument, he placed reliance on the affidavit of Mr. K. G. Sivaswamy dated the 24th May 1948 wherein the deponent states that the grounds of detention served on the petitioner are not true to facts. It is pertinent to observe that Mr. Sivaswamy is a permanent resident of Madras having his abode in No. 8, Westcott Road, Madras and the grounds of detention relate to facts and circumstances which occurred in the Tanjore District and therefore Mr. Sivaswamy could have had no personal knowledge of what happened in Tanjore. Even if we are to accept the statements contained in that affidavit they amount only to this, that Mr. Sivaswamy believes that the petitioner has not committed any of the acts mentioned in the order of detention. From the mere circumstance that a senior member of the Servants of India Society does not believe that the acts mentioned in the order of detention can be attributed to the petitioner, it cannot be said that the Provincial Government has acted *mala fide*. We have carefully perused the grounds of detention submitted to the Provincial Government by the District Magistrate as well as the Government Order dated 8th April 1948, Memorandum No. 334/48-8, and we cannot find any reason to doubt that the action of the Provincial Government was *mala fide*.

It is next contended by Mr. Pillai that the order of detention has been made by an authority not competent to make it and if that is so, the provisions of Madras Maintenance of Public Order Act, 1947, cannot be invoked against the petitioner. Reliance is placed upon the circumstance that the Government Order referred to above does not make mention of the fact that it was issued under the authority and by the order of His Excellency the Governor, but is signed only by the Chief Secretary to Government. According to S. 59(1) of the Constitution Act, all executive actions of the Government of the Province shall be expressed to be taken in the name of His Excellency the Governor and since on the face of the order of the Government it does not appear that the action was taken in the name of His Excellency the Governor, learned counsel strenously contends that the order of detention does not conform to the Act. Even if this is a defect, we are of opinion that it is only one of form and not of substance. In *Gas Plant Manufacturing Co. Ltd.* v. *Emperor* [1] the Federal Court has decided that where instead of the words "Governor-General in Council" a particular order referred to the Central Government, the contention that the order was invalid has to be rejected. The learnd Public Prosecutor also invites our attention to sub-sec. (2) of S. 59 of the Constitution Act which states that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called into question on the ground that it is not an order or instrument made or executed by the Governor. He also informs us that there are rules made under this sub-section empowering the Chief Secretary to issue the order on behalf of the Governor. We are not inclined to accept the contention of the learned counsel for the petitioner that the Government Order dated the 8th April 1948 was not issued by order of His Excellency the Governor as contemplated in S. 59(1) of the Constitution Act. This contention has therefore no force.

Another line of attack is that the detention order made by the District Magistrate on 13—3—1948 is expressed to be made under S. 2(2) of the Madras Maintenance of Public Order Act, 1947, whereas the provision of law applicable is S. 2(1) of the Act. It has to be observed that the District Magistrate was

* [1948] M.W.N. 853; Cr. 193

1. [1947] M.W.N. 393 ; Cr. 85

empowered by the Provincial Government to act under S. 15 of the Act which lays down that the Provincial Government may direct that any power or duty conferred or imposed on them shall, in such circumstances and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority subordinate to the Provincial Government. That the District Magistrate of Tanjore was so empowered under S. 15 is not denied and when once that power is given to him, if he takes action under S. 2(1), he has to report under S. 2(2) to the Provincial Government of the action taken by him. The mere circumstance that a wrong section is inserted in the order of detention cannot by itself be taken as leading to the only conclusion that the District Magistrate did not bestow any attention on the action he took, but merely acted or purported to act in a stereotyped fashion as suggested by the learned counsel for the petitioner. The operative portion of the order makes definite mention that the petitioner was acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it is necessary to detain him. In view of this clear exposition, there is no necessity to make mention of any particular section of the statute. Even if it is obligatory to make mention of the particuler section of the statute, we are far from satisfied that the mention of S. 2 sub-sec. (2) is not apposite. This objection is overruled.

The last contention of the learned Counsel is that the Madras Maintenance of Public Order Act, 1947, came into force on the 12th March 1947 and was to remain in force for a period of one year thereafter. The petitioner in this case was arrested by order dated the 13th March 1948, on which date unless the operation of the Act was extended by the Provincial Government, the Act would not have been in force. Since the Act could not have been in force for more than a year, the delegation to the District Magistrate under section 15 of the Act also could not have enured for more than that period and therefore according to the petitioner, at the time he was arrested, it was done by means of an order which was entirely null and void and without jurisdiction as the District Magistrate had become *functus officio* by that time. The learned Public Prosecutor has invited our attention to G. O. Ms. No. 446, Public (General), dated 27-2-1948, printed in Part I page 168 of the Fort St. George Gazette, dated 2nd March 1948 by which the operation of the Act was extended by His Excellency the Governor. In view of this order which extended the operation of the Act some days before it had automatically ceased to be in force, it cannot be said that at the time the District Magistrate passed the order, the Act was not in force and moreover it is not disputed that the delegation to the District Magistrate was a very general one which was to enure so long as the Act was to be in force. No materials have been placed before us nor has any attempt been made to substantiate the contention that the District Magistrate when he acted on 13-3-1948 was doing an act for which he was not given any authority. This contention has also to be rejected. We have not been shown how this order of detention offends against any of the categories mentioned in the judgment of the Full Bench. In these circumstances, it has to be held that the petitioner was validly and properly detained in accordance with the Madras Maintenance of Public Order Act, 1947, and this Court has no jurisdiction to interfere with that order and to release him under section 491 of the Criminal Procedure Code.

The petition is accordingly dismissed.

Mr. A. K. Pillai now states that he did not contend before us that the Act was not in force when the petitioner was arrested. But both of us understood his argument in the way stated in the judgment and the learned Public Prosecutor countered that argument by showing us the Gazette notification. Anyway we are making this note in response to Mr. Pillai's request.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 1362 of 1947
Cr. R. P. No. 1257 of 1947

November 5, 1948

RAJAGOPALAN, J.

RAMASWAMI CHETTIAR
v.
THE KING

Penal Code (*XLV of* 1860), *Ss*. 105, 186 & 342 —*Firka supply officer seizing paddy without authority—Locking in of Officer—Offence—* G. O. (*Mis*) 467 *dated* 15*th June* 1946.

*P.W.*1, *a firka supply officer, went to the village of the accused to procure surplus paddy under G.O.* (*Mis*) 467 *dated* 15*th June* 1946 *published at page* 526 *in the Fort St. George Gazette, dated* 25*th June* 1946 (*Part II*) *and had a 'D' list of persons from whom he had to obtain surplus paddy. The name of the accused was not in that list. P.W.*1 *entered accused's house found* 17½ *bags of paddy and asked whether accused had a permit for possession. When accused stated that he had no permit, P.W.*1 *asked the accused to surrender the entire quantity, but accused resisted. After recording a statement P.W.*1 *declared his intention of seizing the* 17½ *bags and entered the house, whereupon accused locked the outer door and P.W.*1 *had to stay there till the village munsif released him.*

Held, *P.W.*1 *had no authority under the G.O. to seize the paddy in the possession of accused and therefore resistance thereto did not amount to an offence under s.* 186 *Penal Code.*

*In law the act of P.W.*1 *amounted to trespass and accused had a right to eject the trespasser and that in locking up P.W.*1 *for a whole night accused exceeded his right of private defence and was guilty under s.* 342, *I.P.C.*

S. 104, *Penal Code will have to be read subject to the provisions of s.* 105.

Petition under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the Court of the Sub Divisional Magistrate of Erode dated 9—12—1947 and passed in C. A. No. 43 of 1947 preferred against the judgment of the court of the Stationary Sub-Magistrate of Dharapuram and made in C.C. No. 138 of 1947.

K. S. Jayarama Ayyar for C. K. Venkatanarasimhan, for Petrs.

Public Prosecutor & Balasubramaniam for Crown.

ORDER

There need be no dispute about the facts of the case at this stage. The accused-petitioner was a resident of Nochipalayam and on 6—3—1947 he had in his possession 17½ bags of paddy. P. W. 1, the Firka Supply Officer, reached the house of the accused at about 8-30 p. m., or possibly a little later. P. W. 1 had come to that village that day to procure the paddy, apparently, the surplus paddy within the meaning of G. O. (Mis) 467 dated 15th June 1946 published at page 526 in the Fort St. George Gazette, dated 25th June 1946 (Part II). P. W. 1 had a list with him, the 'D' list apparently containing the names of the persons from whom P. W. 1 had to obtain that surplus paddy. It was a common ground that the name of the accused was not in that 'D' list. When P. W. 1 entered the house of the accused and found 17 1/2 bags of paddy, he asked the accused if the latter had a permit for the possession of those bags. When the accused stated that he had no such permit P. W. 1 asked the accused to surrender the entire quantity, but the accused resisted that claim. After recording Ex.P-1, the statement the accused made, which, however, he refused to sign, P. W. 1 declared his intention of seizing the stock and went inside the house, apparently, to effect that seizure. P.W.1 himself explained that what he meant by seizure was "to seize and remove the stock". When P. W. 1 went inside the house the accused locked the outer door. P. W. 1 had to stay inside that house till he was released the next morning by the village munsif, P.W. 4, who had to open the lock on the front door.

The appellant was convicted under S. 342, I.P.C. and under S. 186, I.P.C.

The conviction under S. 186, I. P. C. cannot be sustained. There is nothing in the G.O. 467 dated 15th June 1946 which I can construe as authorising the Firka Supply Officer to seize any paddy he found in the house of any ryot. As I have already pointed out it was common ground that the name of the accused was not included in the 'D' list. There was nothing to indicate that any portion of 17 1/2 bags of paddy which the accused had in his possession was surplus within the meaning of those rules. What exactly P. W. 1 meant by a permit was not clear from the evidence on record. No doubt r. 5 of the rules promulgated in G. O. 467 states:

> "that the officer could seize stocks of such paddy or rice in respect of which he has reason to believe that a contravention of this order has been committed."

What constituted the contravention of an Order? Was it possession of surplus as defined by

the rules or was it a refusal to surrender that surplus? In the absence of proof that any portion of the 17-1/2 bags of paddy constituted such surplus P. W. 1 could have no reason to believe that possession of any portion of that stock was in contravention of the Order. From the rules that have been brought to my notice, I am unable to gather any authority for P. W. 1 to have seized and removed the paddy in the possession of the accused on the night of 6—3—1947. Quite obviously P.W. 1 was not discharging his functions as a public servant when he entered the house of the accused that night with the avowed intention of taking away the 17-1/2 bags of paddy. The conviction and sentence under S. 186, I. P. C. are set aside.

The next question is whether the conviction under S. 342, I. P. C. can be sustained. Mr. Jayarama Ayyar for the petitioner relied on *Doraiswami Pillai* v. *Emperor* [1] which was followed by Govinda Menon, J. in *Muni Reddi* v. *Emperor* [2] and contended that S. 104, I.P.C. should apply and exonerate the accused of all criminal liability in locking up P.W. 1. S. 99, I. P. C., which bars the right of private defence against an act attempted to be done by a public servant acting in good faith under colour of his office though that act may not strictly be justifiable by law, may not help the prosecution in the absence of proof of good faith. S. 52, I.P.C. lays down, "Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention". Quite obviously, P.W. 1 who was new to his job, was not even familiar with the rules, nor was he aware of the exact scope of G. O. No. 456. He had, apparently no idea of what constituted stock or what constituted surplus stock. But S. 104, I.P.C. will have to be read subject to the provisions of S. 105, I.P.C. The accused had certainly the right of private defence against the trespasser and in law what P. W. 1 committed when he entered the house of the accused with the intention of wrongfully taking the paddy was a criminal trespass and the accused had a right to eject the trespasser. The right of private defence to the property terminated when the reasonable apprehension of danger to the property terminated. Though S. 105, I.P.C. specifies

> "the right of private defence of property against criminal trespass continues as long as the offender continues in the commission of criminal trespass"

it cannot be held that P.W.1 was guilty of continued criminal trespass; that he had to stay in the house till the morning was not of his seeking. In keeping P.W.1 locked up far beyond the limits dictated by the need to protect the property and to prevent criminal trespass the accused committed an offence punishable under S. 342 I.P.C.

The conviction of the appellant under s. 342, I. P. C. is confirmed. Considering that it was P.W.1 who had put himself in the wrong in the first instance, I do not think it is necessary to maintain the sentence that was awarded to the appellant. The sentence is reduced to the period of imprisonment already undergone.

N.T.R.

—

Cr. R. C. No. 740 of 1948
Cr. R. P. No. 697 of 1948

July 14, 1949

PANCHAPAKESA AIYAR, J.

P. VENKATACHALA UDAYAN
v.
THE EXECUTIVE OFFICER, RASIPURAM PANCHAYAT BOARD, Rasipuram
Salam District.

Local Boards Act (*XIV of* 1920), *ss.* 194 (1)(*b*) & 212 (11)—*Applicability.*

S. 194(1)(*b*) *Local Boards Act will apply only to installations in premises for the purpose of industries and factories, and will have no application to a motor and pump installed in a field well for irrigation purposes.*

S. 212 (11) *is a mandatory provision and criminal courts cannot ignore it and convict a person accusd of an offence under the Act.*

Petition under Ss. 435 and 439 Cr.P.C. 1898 praying the High Court to revise the judgment of the court of the Sub Divisional Magistrate, Nammakkal in C. A. No. 15 of 1948 (C.C. No. 1828 of 1947 Stationary Sub Magistrate's Court, Rasipuram).

V. V. Srinivasa Aiyangar for K. Sankara Sastri, for Petr.

Crown Prosecutor for the Public Prosecutor, for Crown.

ORDER

The petitioner, a ryot living within Rasipuram Panchayat limits, has been convicted under ss. 212 and 194 (1) (b) of the Madras Local Boards Act, 1920, for installing a five horse power motor and a pump set in R.S. No. 25/5 (moolai well) in Koncripatti village within the Rasipuram Panchayat limits without having been granted a licence by the

1. [1904] 27 Mad. 52
2. [1948] M.W.N. 356 : Cr. 68

Panchayat and has been fined Rs. 100. Mr. V. V. Srinivasa Iyengar, for the petitioner urged six reasons for quashing the conviction. I need consider only two of them as either of them is enough to quash the conviction. The first is that S. 194 (1) (b) will apply only to installations in premises for the purposes of industries and factories, the minor head under which this section comes, and will have no possible application to a pump installed in a field well for irrigation purposes. The learned Crown Prosecutor agreed. On this ground alone the petitioner's conviction must be quashed. All the considerations of inconvenience to neighbours by this petitioner's drawing away by means of his pump all the subsoil water are irrelevant for the purpose of this criminal case.

The next contention was that under S. 212 (11) of the Local Boards Act, the application for the licence must be deemed to have been allowed as the petitioner applied for a licence on 10—9—1946, and orders on it were not communicated to him within thirty days. The order of refusal was only on 12—2—1947. Such cataleptic sleeps over petitions are the very things disapproved of and provided for in S 212 (11). The lower courts went wrong in stating that the 30 days given in S. 212 (11) were not sufficient to consult the Health Officer and others and so the provision in S. 212 (11) must be ignored. The provision is a mandatory one passed by the Legislature after mature consideration. It is not for magistrate to ignore it and stretch a point against a person accused of a criminal offence and fine him. It is only the Legislature which can amend it and extend the time if it deems fit. And why should it do so when 30 days are ample in all conscience to pass orders on such applications, and cars and air mail make communication quicker? So the petitioner must be deemed to have been granted the licence for the pump for that year even if one was required and must be acquitted on that ground also.

In the end, I set aside the conviction and sentence, acquit the petitioner and order the fine if paid, to be refunded.

N.T.R. — *Petition allowed.*

Cr. M. P. No. 2633 of 1948

March 10, 1949

SATYANARAYANA RAO & VISWANATHA SASTRI, JJ.

DASAPPA v. THE DISTRICT MAGISTRATE, SOUTH KANARA & another

Maintenance of Public Order Act (Mad Act 1 of 1947)—Form of Order—Order in respect of person arrested under S. 151 Cr. P. C.—Habeas Corpus application—Final order pending—Legal.

An order of detention which reproduces the language of the section that the person "is acting or is about to act in a manner prejudicial to public safety" and which does not specify under which clause he falls is not invalid.

The mere fact that a person has been arrested under S. 151 Cr. P. C. does not preclude his subsequent detention under the Maintenance of Public Order Act.

In an application under S. 491 Cr.P.C. the High Court is not empowered to stay proceedings under Mad. Act 1 of 1947 and the provincial government in passing final orders under S. 3 (5) pending a habeas corpus application does not transgress any law or order of the High Court.

Petition under S. 491, Cr.P.C., 1898 praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* directing the Superintendent, Central Jail, Vellore to produce the body of the petitioner herein before the High Court for being dealt with according to law and setting him at liberty.

N. S. Mani for Messrs Rao and Reddy, for Petr.

N. T. Raghunathan for Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER.

[VISWANATHA SASTRI, J.]

This is an application by a person detained under the Madras Maintenance of Pubic Order Act, 1947 (Madras Act 1 of 1947) to this court for the issue of a direction in the nature of *habeas corpus* under S. 491, Criminal Procedure Code. The applicant was arrested on the 25th April 1948 under S. 151, Criminal Procedure Code, by the Police authorities and an order for his detention was passed by the District Magistrate of South Kanara on the 29th April 1948. On the 10th June 1948, the applicant

received a communication from the Provincial Government containing the grounds for his dentention. He submitted his explanation in due course. The Advisory Committee considered the matter and we are informed that on the 17th February 1949, the Government of Madras have passed final orders for the detention of the applicant.

Mr. N. S. Mani, the learned Counsel for the applicant raised four grounds in support of his application. The first contention was that the order for detention itself showed that the District Magistrate did not satisfy himself with respect to the applicant that he was acting or about to act in a manner prejudicial to public safety or the maintenance of public order and that it was necessary to detain him with a view to prevent him from so doing. Reliance is placed on the form of the order, the relevant portion of which runs in these terms:

> "Whereas, I Setu Rao Kaiwar, District Magistrate of South Kanara am satisfied with respect to Dasappa, Master of Balla village that he is acting or about to act in a manner prejudicial to the public safety and maintenance of public order and that with a view to preventing him from so doing it is necessary to detain him."

The argument is that the order does not state that either the appellant is acting or is about to act in a manner prejudicial to public safety and that it is merely a reproduction of the language of S. 2 of the Act. It is contended that the District Magistrate ought to have satisfied himself about one of two things, namely that the applicant was acting or was about to act in a manner prejudicial to public safety and that since he had not done so, the requirement of S. 2, sub sec. (1) was not complied with. We consider this objection to the form of the order to be an unsubstantial one. We are supported in our opinion by the judgment of the Federal Court in *King Emperor* v. *Sibnath Banerjee* [1]. The relevant passage in the judgment of the Chief Justice is as follows:

> "It has been suggested that (1) the form of the recital indicates by use of the word or that no final consideration has been given to each case and that all that the investigating authority has done has been to form a rough conclusion that the case may come within one or other of the reasons quoted and that (2) the use of a cyclostyled form of order indicates a like lack of careful consideration, and that therefore the order is not good *prima facie*. I do not accept these arguments. In my judgment the form of recital is one which a layman might reasonably use when he was satisfied that the case must come within one or other of the specified categories without being prepared to pledge himself with legal exactitude to any particular one or more of the categories."

The objection therefore to the form of the order fails.

The next contention of the learned Counsel for the petitioner is that as the appellant had been arrested under S. 151, Cr. P. C., on the 25th April 1948 and the order of detention was passed on the 29th April 1948 it could not be said that the District Magistrate was satisfied at the time the petitioner was arrested that he was likely to act in a manner prejudicial to public safety or the maintenance of public order. The arrest under S. 151, Cr. P. C., might have been in respect of a cognisable offence wholly unconnected with public safety or maintenance of public order. The detention under Madras Act I of 1947 is in the interests of public safety or maintenance of public order and the scope of S. 151, Cr. P. C., and Ss. 2 to 4 of Madras Act I of 1947 are entirely different. We do not consider that simply because a man has been arrested under S. 151, Cr. P. C., the powers under Madras Act I of 1947 could not be exercised and the person so arrested could not be detained thereunder. There is also some authority for this view in the decision of the Allahabad High Court in *Mool Chand* v. *Rex* [2]. The head-note of the case of the Allahabad High Court is in these terms:

> "The mere fact that certain persons were first arrested under some provisions of the ordinary law and were later ordered to be detained under the U. P. Maintenance of Order (Temporary) Act, is not, in itself, proof of *mala fides* and it is for the person arrested to adduce further circumstances or evidence to show that the executive authorities acted *mala fide*".

In the present case, there is no ground for holding that the action under Madras Act I of 1947 was actuated by any ulterior motive or improper purpose and that with a view to attain that object, the previous arrest under S. 151, Cr.P.C. was made. This contention of the petitioner is unsustainable.

The next contention raised on behalf of the

1. [1943] M.W.N. 612 : Cr. 149

2. [1948] All.L.J. 81

applicant is that the Government had no power to pass a final order in connection with the detention of the applicant after an application had been made to this court under S. 491, Cr. P. C. The applicant is unable to refer to any statutory provision or to any authority in support of his contention. In an application under S. 491, Cr.P.C. this court is not empowered to stay a proceeding under Madras Act I of 1947 and it could not be said that the Provincial Government in fulfilling its statutory duties under S. 3 (5) of Madras Act I of 1947 is in any way transgressing any law or any order of this court. Indeed, it is their duty to deal expeditiously with cases of persons detained under Madras Act I of 1947, and pass final orders, in order that these persons may get the benefit of release after the expiry of six months from the date of the final order.

Lastly, it is contended that the decision of the Full Bench of this court in *Narayanaswami Naidu* v. *The Inspector of Police, Mayavaram* [3] does not fetter our powers to interfere under S. 491, Cr. P. C. and that the limitations laid down in the Full Bench decision are not now operative in view of the later events that have happened in this case. The later events referred to by the learned Counsel for the petitioners are (1) the reference to the Advisory Committee, (2) the subsequent explanation furnished to the Government by the applicant and (3) the report of the Advisory Committee. We consider that the power of this court to interfere with an order of detention passed under Madras Act I of 1947, on an application under S. 491, Cr. P. C., is confined to the four grounds enumerated by the learned Chief Justice at page 23 of the Full Bench decision in *Narayanaswami Naidu* v. *Inspector of Police Mayavaram* [3]. It is only when there is lack of *bona fides* in the order for detention that this court can interfere, apart from the three other grounds enumerated in the judgment of the learned Chief Justice. It may be that, though the initial detention was *bona fide*, its continuance may become malafide by reason of the subsequent event such as non-service of the grounds of detention on the detenu for an indefinite period. We are, however, not concerned with such a situation in the present case. All that has been urged is that there was lack of *bona fides* in the initial order of detention. We have examined the grounds of detention served on the petitioner and we are unable to hold that there are no grounds which would justify detention under S. 2 of Madras Act I of 1947. It is clearly stated that the applicant is interfering with and impeding the work of the police in the matter of detecting crimes and bringing to trial offenders concerned in serious crimes, like dacoity in the locality. It is also stated that his organisation is indulging in violent and subversive activities. It is well-settled that this court cannot investigate the sufficiency of the materials or the reasonableness of the grounds upon which the Government or the empowered authority or officer was satisfied that it was necessary in the interests of public safety and order to detain the petitioner.

For these reasons, we hold that the application fails and we direct that it be dismissed.

N.T.R. — *Petition dismissed.*

3. [1948] M.W.N. 853: Cr. 193

Cr. M. P. Nos. 190 to 192 of 1949.

March 21, 1949.

SATYANARAYANA RAO & VISWANATHA SASTRI, JJ.

M. R. S. MANI

v.

THE DISTRICT MAGISTRATE, MATHURAI & another

Maintenance of Public Order Act (*Mad. Act I of* 1947)—*Detention order—Initial and final —Intervening steps—Non-compliance—Effect Criminal Procedure Code* (*V of* 1898) *S.*491—*Scope of.*

An order of detention made under Act I of 1947 *is open to challenge in an application under S.* 491 *Criminal Procedure Code on the ground that it is not made in conformity with the powers conferred by that Act.*

If the detaining authority has acted in good faith and has come to a decision on relevant materials placed before it that detention is necessary, the court cannot enquire into the sufficiency of the materials or the reasonableness of its satisfaction in regard to the matters of which it is required to be satisfied.

Acts done in the proximate and immediate past and not in the remote past should alone be relid upon to obtain the satisfaction that is required under S. 2 *(1).*

The limitation on the grounds which are open for consideration by the detaining authority and are permissible are the acts which are prejudicial to public safety and maintenance of public order. If the grounds are not within the ambit of the Act, the order of detention would be illegal.

If the grounds disclosed contain grounds, some within the ambit of the Act and some outside it, the order would be wholly vitiated.

If some of the grounds are good and some are vague, indefinite and uncertain, the grounds which are uncertain and vague may be ignored and may be treated as non-existing and the order of detention can be justified on the grounds which are definite and certain.

Where the grounds and particulars served on the detenu under s. 3 (1) specify the actual grounds on which he has been detained there is no prejudice to him if the order of detention is only a mechanical reproduction of the language of the section.

The power of preventive detention must be exercised honestly and for the purposes for which it is intended by law and entrusted to the detaining authority and lack of bonafides on the part of the detaining authority vitiates the order.

Non-compliance with the formalities directed to be carried out by Ss. 2 and 3 of the Act after the exercise of the statutory power of detention under s. 2 (1) (a) is not a mere irregularity not affecting the substantive rights of the detenu. Substantial compliance with the formalities prescribed by s. 2 (2) and s. 3 (1) to (5) is quite essential to sustain the legality of the continuance of the detention.

The fact that an interim or initial detention is legal does not secure for it immunity from attack if the subsequent formalities prescribed by S. 2 (2) and S. 3 of the Act are not substantially complied with and the continuance of the detention would become illegal by reason of such non-compliance.

Although there is no time limit fixed by the Act for the performance of the duties under Ss. 2 and 3 (report by the delegated authority to the Provincial Government, communication of grounds and particulars to detenu, submission to advisory council, report of advisory council, and passing of final order) these steps have to be taken expeditiously and within a reasonable time. What is a reasonable time must, to some extent, depend upon the circumstances of each case. Where the delay is unreasonable and unexplained to the satisfaction of the court, it must be held that the continuance of the detention becomes illegal.

Where in the opinion of the court the grounds furnished are so vague, indefinite and insufficient that the detenu could not fairly be expected to make an effective representation against the legality or propriety of the order for detention, it must be held that his further detention is illegal or improper.

Mere membership of a political party or association would not mean that any particular member is acting in such a manner as to necessitate his detention.

Petition under s. 491, Cr.P.C. 1898, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of *habeas corpus* for the production before the High Court, Madras of the person of M. R. S. Mani, a detenu in the Central Jail at Vellore to be dealt with according to law and to direct that he be set at liberty etc.

N. S. Mani for Messrs Row and Reddy, for Petrs.

N. T. Raghunathan for Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

SATYANARAYANA RAO, J.: (Cr. M. P. 190 of 1940). This and the connected petitions under S. 491 of the Criminal Procedure Code were heard together as they raise common questions of law under the Madras Maintenance of Public Order Act, I of 1947.

The facts and the contentions peculiar to the other petitions will be dealt with separately. Under S. 2 (1) (a) of the Act the District Magistrate, Madura passed an order of detention dated 1st April 1948 and the applicant was arrested on the same day. He was kept in police custody at Madura till the 3rd April when he was removed to the Central Jail, Vellore. The grounds of detention were communicated to the applicant on 24–4–1948, and he submitted his explanation on the 10th May 1948. The Government referred the matter to the advisory council on the 14th February 1949 and the matter is still pending with it. This application was filed on 18–1–1949 and till now no final order was passed by the Government under s. 3 (5) of the Act.

Mr. N. S. Mani, the learned counsel for the applicant raised two contentions: firstly that the order of detention was void *ab initio* and not bona fide as the grounds now communicated to the detenu would not justify the order; secondly it was argued that as Government had failed to comply with the mandatory provisions required to be carried out after the order of detention under s. 2 (1) was passed the continuance of the detention of the applicant is in any event, illegal.

The first of these contentions may be disposed of shortly, the order of detention passed by the District Magistrate who was empowered under s. 15 of the Act to take action under the Act states that he was satisfied that the applicant was acting in a manner prejudicial to the public safety and that with a view to prevent him from so doing, it is necessary to

detain him. The satisfaction of the detaining authority is a condition precedent for the order of detention. An order which is legal on the face of it is presumed to have been legally made and the jurisdiction of this court to go into the validity of such an order was considered by the Full Bench in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1]. The Full Bench judgment was based upon an elaborate consideration of the decisions of the courts in England and in India bearing upon the question, particularly the decisions of the House of Lords in *Liversidge* v. *Sir John Anderson* [2] and *Greene* v. *Secretary of State for Home Affairs* [3]. The learned Chief Justice after examining the authorities formulated under four heads the limitations within which this court could interfere in the exercise of its jurisdiction under S. 491, Cr. P. C. with orders made under S. 2 of the Act. They are:—

"(1) When the order is not duly authenticated, as for example, when it is passed by an officer or authority not empowered under S. 15 of the Act;

(2) When the person detained in pursuance of the order is not the person intended to be detained, that is to say, when there is a mistake of identity:

(3) When there is lack of *bona fides*; and

(4) When it is established that the essential requirement of S. 2, namely the satisfaction of the Provincial Government or an officer or authority empowered under S. 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under S. 2 (1) of the Act, is not present. If it is established that neither the provincial Government nor the officer or other authority empowered under S. 15 has exercised its or his mind on the material placed before it or him, then an order of detention though purporting to be passed under S. 2 (1) must be deemed to be not an order under S. 2."

The other learned judges also agreed with this view. Under S. 2 of the Act, the satisfaction of the detaining authority is a subjective state of mind and not an objective fact. It is not open to the Court to go into the question whether the detaining authority could or could not be so satisfied on the grounds subsequently disclosed to the detenu, nor is it open to the Court to compel the Government or the detaining authority to disclose the facts or the material or the grounds on the basis of which the order was made. There is however, a duty cast upon the Executive Government under S. 3 of the Act to disclose the grounds. But so far as the satisfaction is concerned, it is the satisfaction of the Provincial Government or of the empowered authority, as the case may be, and not that of the Court. In the words of the learned Chief Justice in the Full Bench:

"If these grounds do not exist, it is well established on the highest authority that this Court cannot investigate the sufficiency of the material or the reasonableness of the grounds upon which the Government or the empowered officer or authority had been satisfied. It is not competent for this Court to call upon the Government or the detaining authority to disclose the information and material on which it or he was satisfied as to the necessity for the detention of the person concerned. The satisfaction required by the section is the satisfaction of the Government or the empowered authority and not the satisfaction of this court. There is no question of fact which can be submitted to this Court in this matter. This position was fairly conceded by learned Counsel appearing on behalf of the petitioners."

Govindarajachari J., the other learned Judge, expressed the same view at page 36 as follows:

"Negatively it can be said that the sufficiency of the available material or information to justify the order of detention and the question whether the officer concerned could be said to have reasonable grounds for the issue of the order in question are not matters which are within the cognisance of the Court. The satisfaction is the satisfaction of the officer. He is the sole judge and once the conclusion is reached that he was satisfied the detenu cannot invite the Court to go behind it and dissect the reasons which weighed with the officer and find out for itself whether the order should have been issued. While the satisfaction of a properly constituted authority is a condition precedent to the issue of an order of detention, whether the circumstances called for the issue of such an order is a

1. [1948] M.W.N. 853 : Cr. 193
2. [1943] A.C. 206
3. [1942] A.C. 284

matter entirely for its consideration and nobody else's."

Govinda Menon, J. also was of the same opinion. The learned judge states at page 49:

"It is not open to the Court to find out whether the grounds on which the Provincial Government is satisfied are sufficient. Different standards of satisfaction are likely to exist in the case of different individuals even if the society were ideal. In the society as it is constituted today, we cannot expect the same standard in every individual, so that if the executive authority states *bona fide* that it is satisfied, this court cannot say that it is not a proper or valid satisfaction."

The same view was also taken by the other High Courts construing similar provisions in the Public Safety Acts in the respective provinces.

It was argued that if the grounds disclosed are such as would not justify in the opinion of the Court, the conclusion that the detenu was acting or was about to act in a manner prejudicial to public safety or the maintenance of public order, then, the inference should be drawn that the order was not *bona fide* and that this court would have the jurisdiction to interfere in such a case under category (3) referred to by the learned Chief Justice in the judgment of the Full Bench. Even if the grounds do not warrant the making of an order under S. 2 of the Act, and the decision of the authority concerned that it was so satisfied is erroneous, it cannot be inferred that either the Provincial Government or the detaining authority were actuated by malice in making the order and that therefore it is *mala fide*. A judgment, however, erroneous it may be, cannot be held to be a *mala fide* judgment. The discretion under the section of passing an order of detention if the condition is satisfied is vested in the authority concerned and it cannot be questioned.

It was contended on behalf of the applicant that the Full Bench while laying down that the satisfaction cannot be questioned and canvassed in a proceeding under S. 491, Cr.P.C. placed no limit on the grounds open for consideration by the detaining authority and that to take an extreme case, if a man was detained under S. 2 (1) of the Act on the ground that his nose was long, it would not be open to this court to consider the legality of the order of detention. This contention, no doubt, has considerable force, but in my opinion there is a limit and a clear ne of demarcation regarding the grounds which are open for consideration by the detaining authority and the Full Bench was not called upon to consider and lay down the limits of that demarcation. It must be remembered that the power of the Provincial Legislature to enact a law of the kind now under consideration is derived under item 1, list ii, (Provincial Legislative List) of the Government of India Act, 1935, which is as follows :

"Public Order (but not excluding the use of His Majesty's naval, military or air forces in aid of the civil power): the administration of justice; constitution and organisation of all courts except the Federal Court, and fees taken therein; *preventive detention for reasons connected with the maintenance of public order*; persons subject to such detention". (The italics are mine).

The power to legislate is for preventive detention for reasons connected with the maintenance of public order and the preamble of the Act (Madras Act I of 1947) states :—

Whereas for the maintenance of public safety and to prevent and put down disorders involving meance to the peace and tranquillity of the Province, it is necessary to provide for preventive detention, imposition of collective fines, etc., etc., it is hereby enacted as follows."

The power conferred on the legislature and the preamble to the Act make it clear that the object of the legislature is preventive detention and the basis on which the order for detention is made is that a particular person in acting or about to act and after the amendment of 1948, or is likely to act, in a manner prejudicial to the public safety or the maintenance of public order and that therefore with a view to prevent him from so acting, it is necessary to make an order of detention. The acts which justify an order of detention under the Act are acts which are prejudicial to the public safety or the maintenance of public order. The person sought to be detained must be one who is either acting in such a manner or is about to act in such a manner or is likely to act in such a manner. The limitations, therefore, on the grounds that are open to the detaining authority for consideration and are permissible are the acts which are prejudicial to public safety and the maintenance of public order. The grounds, therefore, must be grounds which lead to the inference that the person concerned is acting or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order,

If the grounds, therefore, are not within the ambit of the Act, the order cannot be justified. The Full Bench had not to consider and was not called upon to consider to what extent the acts of a person are permissible and can be taken into consideration under s. 2 of the Act by the authority concerned. The illustration that is given in the course of the argument by the learned advocate of a person having a long nose and detained on that account under s. 2 (1) of the Act would be an instance of a ground which is entirely outside the purview of the Act and an order of detention based upon material which is not within the ambit of the Act would be wholly illegal. Of course, as pointed out by the Full Bench of the Bombay High Court in *In re Rajdhar* [4], if the grounds disclosed contain grounds, some within the ambit of the Act and some outside it, the order of detention would be vitiated, wholly as in that event, it would be impossible to say which of the grounds and to what extent the detaining authority was influenced by acts outside the Act in making the order of detention. If, however, some of the grounds are good and some are vague and indefinite and uncertain, the grounds which are uncertain and vague may be ignored and may be treated as non-existing, and the order of detention can be justified on the grounds which are definite and certain. This is also the view expressed by Chagla O. C. J. in the Full Bench of the Bombay High Court. In my opinion, that decision affords a clear line of demarcation between grounds which are permissible under the Act and grounds which are not permissible under it in making an order of detention under s. 2 of the Act. In dealing with the several petitions now before us, we have to bear these principles in mind in arriving at a correct decision.

It was also argued on behalf of the applicant that it will be open to us to go behind the Full Bench judgment and reconsider the position whether there is justification for the view expressed by the Full Bench that the satisfaction of the detaining authority cannot be canvassed in a proceeding under s. 491 Cr. P. C. No reasons are given in support of this extreme contention except inviting us to reconsider the authorities relied on in the judgment of the Full Bench and I see no reason to accede to this request. The decision of the Full Bench is clear and was based, if I may say so with respect, upon a careful consideration of all the authorities bearing on the question and it will be, in my opinion, an unnecessary waste of time to reconsider it.

The effect of non-compliance of the executive Government with the various steps laid down under the Act, after the order of detention under S. 2 was passed till the stage of a final order under S. 3 (5) on the legality of the continuance of the detention is a more difficult question. The Full Bench was concerned only with the original order of detention under S. 2. This was made clear in the judgment of Govindarajachari, J. at page 31 of the Madras Law Journal Report. The learned judge observed:

> "The challenge in every one of the cases involved in the batch of applications before us is a challenge against the order of detention itself and not that even if the order was valid at its inception the continuance of the detention has become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do. I say this merely to guard myself against being understood as having decided anything more than what is strictly required by the applications under consideration."

The Full Bench judgment, therefore, does not help us in deciding this difficult question.

The object of the Act, as stated already, is preventive detention and not punishment. The preliminary step under the Act is an order of detention under S. 2 (1) which is conditional on the satisfaction of the detaining authority. The final step contemplated by the Act is the passing of the order by the Provincial Government under S. 3 (5) of the Act. While the order under S. 2 may be passed either by the Provincial Government or by an officer or authority to whom the power was delegated under S. 15 of the Act, the subsequent steps should be taken and the final order itself should be passed by the Provincial Government. The officer or authority empowered under S. 15 after making an order of detention under S. 2 (1) has forthwith to report the fact to the Provincial Government together with the grounds on which the order was made, along with such other particulars as will have a bearing on the order under S. 2 (2). After this the officer or authority empowered under S. 15 has no statutory function to discharge. The next step after the order of detention was made is

4. [1948] 50 Bom. L.R. 183 F.B.

provided by S. 3 (1). Under it, the Provincial Government has to communicate to the person affected by the order "so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes a representation against the order." There is no time limit fixed under the Act for the Provincial Government to communicate this information. After the receipt of the grounds, the person detained has got the right to make a representation to the Government and that the very section enjoins upon the Provincial Government to inform the person of his right to make such a representation and also to afford him an opportunity of doing so. After the representation is received, the next step is, the Provincial Government has to place the matter before the Advisory Council constituted under the Act. The Advisory Council, thereafter after considering the material placed before it and after calling for such further information from the Provincial Government or from the person concerned has to submit a report to the Provincial Government, and after the receipt of that report the final step is the Provincial Government has to pass an order under S. 3 (5) either confirming or modifying or cancelling the order made under sub-section (1) of S. 2. Under S. 4, the order of detention continues in force for a period of six months from the date on which the final order under S. 3 (5) was passed by the Provincial Government. But, of course, it is open to the Provincial Government to release the detenu even before the expiry of the period of six months. For taking the various steps above described, no time limit is fixed under the Act. It must be remembered that the Act interferes with the liberty of the subject without any trial and without any other remedy by way of appeal or otherwise to any other authority except the restricted and limited right of making a representation to the Government and through it to the Advisory Council whose opinion, however, is not binding on the Government. This restricted right of representation therefore, should not be still further curtailed by non-observance of any of the steps laid down by the Act. We have instances in which a final order under S. 3 (5) was not passed by the Provincial Government even though the detention has continued in force for more than several months, in some cases nearly a year. The result of this is, if ultimately the Government were to decide after considering the representations made by the detenu that the person should be set at liberty, such person would have unjustly been deprived of his liberty for no fault of his. Even if the Government were to decide that the original order of detention should be confirmed under s. 3 (5), the result even in such a case would be that while the Government would be entitled to keep him in custody for a period of six months only from the date of the final order, by reason of the delay on the part of the Provincial Government in taking the steps contemplated by the Act, his detention would be unnecessarily and perhaps unjustly, prolonged which is contrary to the spirit of the Act.

It is therefore necessary to consider to what extent the provisions of the Act enjoining the Provincial Government to take certain steps are mandatory and whether if those provisions were not observed properly by the Provincial Government the continuance of the detention would become illegal or improper within the meaning of s. 491, Cr. P. C. There is no time limit fixed by the Act for either communicating the particulars and grounds under s. 3 (1) or for referring the matter to the Advisory Council after the representation of the detenu is received, or even to pass a final order under s. 3 (5) after the report of the Advisory Council is received. The absence of the time limit is probably responsible for the inordinate delay we have noticed in some of these petitions on the part df the Government in taking the steps. It is an accepted rule of construction of a statute, that where no time limit is fixed for the doing of an act enjoined by it, the act should be performed within a reasonable time and it is unnecessary to consider the authorities in support of this rule of construction and it would be sufficient to refer to the Full Bench decision of Patna High Court in *Murat Patwa* v. *Province of Bihar* [5]. In the petitions before us, there is no complaint of unreasonable delay in furnishing the grounds under s. 3 (1). We may however observe that the question was considered by Subba Rao and Mack, JJ. in *Venkataraman* v. *Commissioner of Police Madras* [6] in which the question that arose for consideration was the effect of the delay caused by the detaining authority in communicating to the Provincial Government the grounds of detention under s. 2(2) of the Act.

5. [1949] A.I.R. Pat. 135
6. [1949] M.W.N. 9: Cr. 1

The learned judges held that the subsequent non-compliance with the provisions of the Act after an order of detention under s. 2 (1) was made, would not affect the legality of the original order of detention and would not make it *ab initio* void. They were also of opinion that the delay in communicating the grounds under s. 2 (2) would not even affect the further detention. In dealing with the contention that by reason of the non-observance of the subsequent provisions of s. 2 (2), the continuance of detention became illegal, Subba Rao, J. observed at page 92:—

"This argument ignores the distinction between the order of detention and the procedure prescribed for enabling the aggrieved party to seek redress. The petitioner, as we found, was legally detained under s. 2 (1) of Madras Act I of 1947. Under s. 4 of the Act this order of detention shall be in force for six months from the date on which it is confirmed or modified under sub-sec. 5 of s. 3. If the authority concerned did not carry out his statutory duties, the petitioner would have taken the appropriate remedy to compel him to perform his duty. He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned. But in our view the non-compliance with the provision of sub-sec. (2) to s. 2 could not make the detention illegal. In any view as the order was communicated to the Government and the grounds for detention were duly served on the petitioner it would be impossible to hold that the detention of the petitioner at present is invalid."

The question of the effect of the delay in communicating the grounds to the Provincial Government under s. 2 (2) by the detaining authority does not directly arise for consideration before us. We are, however, unable to see what remedy a person would have to compel the detaining authority to perform the statutory duty of communicating the grounds under s. 2 (2). If the authority concerned is outside the original jurisdiction of the High Court, even a *mandamus* would not lie. It is difficult to see that other remedies a person in such a situation would have if there was a clear breach of a statutory duty by the authority concerned. The man was deprived of his liberty, was in jail and there is no means of enforcing the statutory obligation to communicate the grounds under s. 2 (2) to the Provincial Government. The question came up for consideration before a Full Bench of the Patna High Court in which the delay complained of was the delay in communicating the grounds under S. 4 of the Bihar Maintenance of Public Order Act corresponding to S. 3 of the Madras Act. If the grounds of detention were not communicated to the detenu within a reasonable time and there is no acceptable explanation for the delay, the further detention becomes illegal. If the complaint before us in the petitions now under consideration was one of delay in communicating the grounds under S. 2 (2) or in communicating the grounds under S. 3 (1), in the light of the decision of the Full Bench of the Patna High Court, the decision in *Venkataraman* v. *Commissioner of Police Madras* [6], in my view, would require reconsideration and would have necessitated a reference to a Full Bench for an authoritative decision on the point. But as the objection before us is of a different nature, it is unnecessary to follow such a course.

The main ground of complaint before us in the several petitions is that the Provincial Government failed to carry out the duty of communicating to the detenu the grounds on which the order has been made, and such other particulars as are, in their opinion, sufficient to enable the detenu to make an effective representation to the Government. The contention is that the grounds are vague, indefinite and uncertain and that no particulars were given in any of the cases. As the detenu was not placed by the executive Government in a position of making an effective representation to government, he was deprived of the usefulness of the only remedy that is open to him under the Act to prove to the satisfaction of the Government and the Advisory Council that he was not guilty of any of the activities attributed to him. The relevant provision of S. 3 (1) is:—

"Where an order in respect of any person is made by the Provincial Government under sub-sec. (1) of S. 2 or where any such order is made by any officer or authority subordinate to them, after receipt of the reports specified in sub-sec. (2) of that section, the Provincial Government shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes a representation against the order."

This provision is mandatory and imposes on

the Provincial Government a duty of communicating to the detenu the grounds on which the order was made. So far as the grounds are concerned, there is no power under the Act to withhold any of the grounds, as the grounds to be communicated are the grounds on which the order has been made which implies that all the grounds could be communicated to the detenu. So far as the facts are concerned, it is no doubt left to the Provincial Government to consider whether all the facts should be disclosed to the detenu or only some of them. They are not bound to disclose all the facts if they consider that such disclosure would be against public interest. The Act makes a distinction between facts, grounds and particulars. While all the grounds have to be communicated and such facts as would not endanger public interest alone could be disclosed, so far as the particulars are concerned, the Government are to communicate to the detenu so much of the particulars as would be sufficient in their opinion to enable the detenu to make a representation against the order. The Provincial Government, therefore, has to decide whether the particulars given and disclosed would be sufficient to enable the detenu to make a representation against the order. If the grounds are vague and uncertain, it would be open to the Government to supplement them by giving particulars to enable the person concerned to make a proper representation. If the grounds communicated are vague and uncertain, and no particulars are given, does the non-observance of the rule make the further detention illegal or improper?

Under the Act the liberty of the subject is curtailed without trial by courts established by law and the only safeguard provided by the Act for the detenu is the right to make a representation to the Advisory Council through the Provincial Government. This right is a substitute for a trial under ordinary law. In order to enable the detenu to present his case properly he should know the grounds and the particulars of the grounds on the basis of which an order for detention is made under S. 2 (1). The duty of providing this information was laid by the Act on the Provincial Government. The power conferred upon the Provincial Government of curtailing the liberty of the subject by the Act should, in my opinion, be exercised subject to the conditions and limitations imposed by the Act. It is the function of the Court to see whether the conditions laid down by the statute are properly carried out or not. If they are not duly observed and fulfilled, the very foundation of the power to continue to detain the person comes to an end and the further detention becomes illegal. If the grounds furnished are no grounds at all in the sense that they convey no information to the person detained, or even if they are grounds outside the purview of the Act, the continuance of the detention cannot be justified. It may not be necessary that the Provincial Government should furnish legal evidence or proof of the accusations against the detenu, as in cases where he is charged with a crime, but the information furnished must be such which enables the detenu to present his case effectively.

In *Dale's case* [7] dealing with an application for a writ of *habeas corpus*, the rule requiring the observance of the steps laid down by law and its effect upon the detained person is stated thus by Brett, L.J. (page 461):

> "It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue."

And again, at page 463:

> "I desire to state that although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at Westminster will not allow any individual in this Kingdom to procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects."

Cotton L. J., in the same case concurred with Brett, L. J. and stated the rule in his own words as follows (at 469):

> "I quite agree with Brett, L. J. that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be

7. [1881] 6 Q.B.D. 376 (461-3)

matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance."

The other High Courts, which considered a similar question under the Public Safety Act, have unanimously held that where the particulars given are indefinite and vague and uncertain there is no compliance with the provisions of the Act and the continuance of the detention is illegal. Vide, *Nek Muhammad* v. *Province of Bihar* [8], *In re Krishnaji Gopal Brahma* [9] and *Durgadas* v. *Rex* [10]. I respectfully agree with the reasons given in those judgments for holding that where there is no substantial compliance with the provisions of s. 3 of the Act, the continuance of the detention becomes illegal. It is unnecessary to examine these decisions at length.

The Court of Appeal in *Green's case* [11], considered the effect of an error in the grounds communicated to the detenu on the continuance of the detention. The detenu there was informed of the grounds on which the order of detention was made and was also furnished with the particulars to enable him to present his case to the Advisory Council. The grounds communicated stated that he was concerned in one kind of acts endangering public safety, while the order of detention was made in fact, on a totally different ground. The detenu, however, was served with a true copy of the actual order and the particulars clearly stated the correct ground of detention. He did not, however, draw the attention of the Advisory Council to the material discrepancy between the two. Goddard, L. J. with whom the other Lord Justices agree held "That a mistake in the document served on the detenu after he was in custody would not invalidate the original order of detention nor does it render its continuance invalid. There was nothing to show that the detenu was in any way prejudiced by the mistake." This aspect of the case was referred to and dealt with by the House of Lords on appeal. The House of Lords agreed with the court of appeal, that as no prejudice was caused to the appellant by the error in the document sent to him by the Advisory Committee, the detention or its continuance was not illegal. Lord Macmillan at page 298, observed:

"This mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention. Consequently the mistake affords no ground for invalidating the detention order and does not help the appellant in his present application."

The test applied by the House of Lords was whether by reason of the mistake, there was any prejudice to the detenu and if there was no prejudice no question of its effect on the detention arose for consideration particularly as in that case the mistake was one which could be remedied.

In cases where on the basis of vague, indefinite and uncertain grounds a representation was made by the detenu to the best of his ability and after the matter was considered by the Advisory Council, the Provincial Government passed a final order of detention, there was no further means of remedying the defect and it cannot be said that when a Provincial Government failed to discharge its duty the fact that the detenu did not complain at the time of making the representation of want of particulars he is precluded from agitating the question now. The grounds, therefore, in each of the petitions before us have to be examined in the light of these principles.

In some of the petitions we have noticed that there is considerable delay on the part of the Provincial Government in referring the matter to the Advisory Council even after the representation by the detenu was received. In other cases, there was also delay in passing final orders after the report of the Advisory Council was received. The Government, it must be mentioned, has to deal with a number of applications of this nature and actually time would be taken in examining the representations made in the light of the information available and in referring the matter to the Advisory Council. It may be that the Provinicial Government requires in certain cases further information from the District Magistrates and that might occasion some delay. Making due allowance for all these considerations, a delay of several months, if not properly explained, cannot be altogether ignored. The question of the effect of the delay in referring to the Advisory Council was considered by me and Rajagopalan, J. in Cr. M. P. No. 200 of 1949, and we stated in the judgment in that case:

8. [1949] A.I.R. Pat. 1 F.B.
9. [1948] A.I.R. Bom. 360
10. [1949] A.I.R. All. 48
11. [1942] 1 K.B. 87 (113)

"We should however be inclined to say that any period in excess of the statutory limit of six months made applicable to an order under S. 3 (5) would by itself be proof *prima facie* of unreasonableness. But whether delay in any given case is unreasonable or not has to be judged with reference to the circumstances of that case taking also into account that the period was far in excess of six months."

Horwill and Govinda Menon, JJ. observed in Cr. M. P. No. 2128 of 1948 that any further delay beyond a fortnight after the date of the order passed by the learned Judges would be sufficient to show that further detention would be illegal. The delay, therefore, in the two stages, namely in referring the matter to the Advisory Council and in passing a final order under S. 3 (5) after the report from the Advisory Council was received, if unreasonable and is not properly explained would have the effect of making the continuance of the detention illegal.

In the present application, excluding the activities in 1946 and before August 1947 when the applicant was released from detention, the only ground communicated to him would not in my opinion, convey any information, nor does it refer to any activities on his part showing that he is acting in a manner prejudicial to the public safety or its maintenance. The communist party was not declared illegal, in which case, it will be open to the Government to take action under S. 17 of the Criminal Law Amendment Act, if the person continued thereafter to associate himself with that party. Even if a party is declared illegal, the mere association with that party would not justify the inference that the person was acting in a manner prejudical to public safety. In the Allahabad and Patna cases already referred to, which dealt wilh cases of members of Rashtriya Swayam Sewak Sangh, it was pointed out that the mere association as such with the party after it was declared illegal is not an activity which endangers public safety. We are not concerned with the objects of a particular political party, nor are we prepared to accept the argument advanced on behalf of the applicants that the proceedings under the Act are actuated by political animosity and that therefore, they are *mala fide*. We are concerned only with the question whether the grounds communicated are definite and are such as would enable the applicant to present his case properly to the Provincial Government. To take a sample of the grounds communicated to the present applicant, one of the grounds stated that the applicant ridiculed the proposals of the Government to award compensation to the zamindars and inamdars; that he was also actively engaged in the Madura Municipal election propaganda to get Communist candidate elected. These grounds besides being vague, are, in our opinion, entirely outside the purview of the Act. A political party is entitled to take part in municipal or other elections and for that reason alone it cannot be said that the activity of a person concerned is such as to endanger public safety, nor his criticism of the proposals of the Government to award compensation to the zamindars and inamdars under legislation now pending sanction before the Governor-General for the abolition of the zamindaries. No dates are given as to when and where the person concerned ridiculed the policy of the Government. And the only other ground that is added is that he spread alarmist ideas about the number of workers that would be retrenched if the recommendations of the Committee were given effect to. Nobody knows and there is nothing to indicate what this committee is and what the reference to the alarmist ideas about the number of workers to be retrenched is. The grounds are not only outside the purview of the Act but are indefinite and vague. With these grounds, if they can be called grounds, it is impossible for any person to make any representation to the Government to show his innocence and to establish that he is not guilty of any of the conduct attributed to him. We are therefore satisfied that as the statutory requirements have not been satisfied and as even no particulars were given, the continuance of the detention of the applicant is not justified. We direct, therefore, that the applicant should be set at liberty forthwith.

Cr. M. P. No. 191 *of* 1949. The applicant in this case was arrested under s. 151, Cr. P. C. on the 27th March, 1948. The order of detention under s. 2 (1) of the Act was passed on 9-4-1948 by the District Magistrate Tanjore. The District Magistrate states in the order that the applicant is acting,—about to act in a manner prejudicial to public safety, and maintenance of public order. He was removed to Central Jail, Vellore on 12—3—1948. The grounds of detention were furnished to him on 21-4-1948. On 11-5-1948 the applicant sent a representation to the Provincial Government. The matter was referred to the Advisory Council on 22-6-1948. On 22-12-1948 the Advisory Council recommended that the applicant should be released. The

Provincial Government, however, did not accept this recommendation but confirmed the original order of detention under S. 3 (5) of the Act.

In this case also the grounds alone were communicated and no particulars were given. The only substantial ground is that he advocated acts of violence and was engaged in intimidating local and imported workers. The ground does not say when and where he advocated acts of violence and the reference to intimidation of local and imported workers is wholly unintelligible and is indefinite in that it does not even give the approximate time and date. Some of the grounds are outside the purview of the Act. There is no compliance with the provisions of S. 3 (1) of the Act and we, therefore, direct that the petitioner should be set at liberty forthwith.

Cr. M. P. No. 192 *of* 1949. The applicant in this case was arrested under S. 151 Cr.P.C. on 2—5—1948 and an order of detention was passed on 15—5—1948 and thereafter he was removed to the Vellore jail. The grounds were communicated on 9—6—1948. He submitted his representation on 29—6—1948 and the matter was referred to the advisory council on 14—7—1948. The Advisory Council recommended by its report dated 20—1—1949 that he should be released, but the Provincial Government passed a final order on 15—2—1949 confirming the original order of detention.

On an examination of the grounds, we are satisfied that the grounds contain sufficient particulars and are not vague and indefinite. The original order of detention was objected to on the ground that the authority of the District Magistrate passing an order under S. 2 (1) was not disclosed in the order of detention. It is not necessary to state the authority and if the petitioner had raised the objection and seriously contended that the District Magistrate was not empowered under S. 15 of the Act, the order would have been easily produced. We therefore think that there is no substance in this contention.

It was also argued that the order of detention was passed after he was arrested under S. 151, Cr. P. C. and this indicates that the order was not *bona fide*. S. 151, Cr. P. C. authorises a police officer to arrest a person designing to commit a cognisable offence, and therefore, if there was material justifying the action under S. 2 (1) of the Act, there is no reason to hold that the order of detention is illegal. We think, therefore, that there is no case for interference made out in this application. The application is therefore dismissed.

VISWANATHA SASTRI, J.—We have, during the last few days, been hearing many applications filed under s. 491, Cr. P. C. by persons detained in Jail under Madras Act I of 1947. The grounds raised by the applicants in these applications are more or less the same and are of general importance. We heard arguments on the common questions arising for decision in these applications before considering them individually on their merits. We are indebted to the learned counsel for their assistance.

In these applications we have been repeatedly and forcibly reminded by counsel for the detenus that it is our duty to exercise our powers under s. 491, Cr. P. C. freely and liberally in order to protect the personal liberty of citizens against unjustifiable interference by executive authority. Language much more trenchant and even provocative, is employed in the affidavits filed by the detenus themselves in support of their applications. Madras Act I of 1947 professes to be an emergency measure and not a permanent part of the statute book. In the troublous times through which this country has recently been passing, interference with the personal liberty of citizens has been extended and legalised by the legislature to an extent which would not have been considered as legitimate in normal times. These temporary encroachments on individual freedom have been made in the larger interests of the State, dictated as they are by the paramount needs of peace, order and good Government. It is the considered opinion of the Legislature as expressed in the preamble to Act I of 1947 that there is an urgent necessity for imposing in the interests of public peace and tranquillity, and for ensuring the continuance of services vital to the life of the community, restraint on individual liberty. The Act has imposed the duty, and given the power of taking preventive action against persons acting or about to act in any manner prejudicial to public safety or the maintenance of public order, on the Provincial Government or its duly constituted delegate. S. 16 (1) of the Act prevents an order made in the exercise of a power conferred by or under the Act from being called in question in any court. Preventive detention in connection with the maintenance of public order is within the legislative competence of the Provincial Legislature under the Government of India Act, 1935 (Schedule VII, list No. 2, entry

No. 1) and it has not been contended before us that Act I of 1947 as a whole or S. 16 (1) in particular, is *ultra vires* the Provincial Legislature.

In England the House of Lords on two memorable occasions, in times of national crisis, upheld the legality of the imprisonment of British subjects without trial and opportunity of defence in court, if the Home Secretary thought it reasonable to imprison them in the interests of the public safety and for the due prosecution of the war. It was held that the executive was not even compellable to give its reasons for detention. The writ of *habeas corpus*, the most important writ known to English Constitutional Law and one of the privileges of Englishmen zealously guarded and maintained by the English Courts, was held to have been displaced in effect, though not in form by the emergency powers of preventive detention vested in the executive by the legislature. The restraint was held not to be illegal because it was justified by the terms of the statutory regulation and the writ of *habeas corpus* was, therefore refused. I am referring to the well-known "Regulation 14(B)" and "Regulation 18 (B)", cases *Rex* v. *Haliday* [12], *Liversidge's Case* [2] and *Green's Case* [3] which have largely influenced the interpretation of Madras Act I of 1947 notwithstanding the difference between the English Regulation and the Indian enactment. Neither the fact that drastic powers have been given to the executive authority nor the fact that they are liable to abuse, should stand in the way of our interpreting and giving effect to the terms of Act I of 1947 according to their plain and natural meaning. At the same time, as the Act empowers the executive to deprive a subject of his liberty without a trial and conviction,—indeed for no offence of his—the process being somewhat euphemistically called "preventive justice" or "preventive detention," this Court ought to insist that the executive exercises its powers strictly in accordance with the terms of the statute and within its four corners and observes every formality prescribed by the Act. I respectfully agree with the following observations of Subba Rao, J. in *A. K. Gopalan* v. *District Magistrate, Malabar* [13] which arose under this Act.

> "It is the sacred duty of this Court to see that no citizen of this province, whether he is rich or poor, whether he belongs to this or that political persuasion is illegally detained for one minute .... No provision of the statute restricting the liberty of the citizen can be overlooked and no breach of any provision thereof can be condoned on the ground of administrative convenience."

In spite of the enactment of S. 16 of Madras Act I of 1947 restricting the jurisdiction of courts, it is now well settled that an order of detention made under Act I of 1947 is open to challenge in an application under S. 491, Cr. P. C. on the ground that it was not made in conformity with the powers conferred by that Act: *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1], *Sibnath Banerji's Case*[14] on *appeal from the Federal Court*[15], *Basantha Chandra Ghose* v. *Emperor* [16]. Personal liberty is one of the most cherished rights of a citizen of this or any other civilized country of which he cannot be deprived except by and in strict conformity with the law. On what grounds then can the legality of an order of detention made under S. 2 (1) (a) of Madras Act I of 1947 be questioned by the person aggrieved?

An analysis of the provisions of the Act governing the preventive detention of persons reveals the following seven steps or stages in the proceedings connected with such a detention. (1) Satisfaction of the Provincial Government or its delegate empowered under S. 15, that a person is acting or about to act or likely to act in any manner prejudicial to public safety or the maintenence of public order [S. 2 (1)]. (2) Order directing the detention of such a person [S. 2 (1) (a)]. (3) Report to be made forthwith to the Provincial Government together with the grounds of detention and other particulars if the order for detention is made by a delegate of the Government [S. 2 (2)]. (4) Communication to the detenu of the grounds of the order for detention with particulars sufficient to enable him to make a representation against the order. (5) Reference by the Provincial Government to the Advisory Council of the case of the detenue together with the grounds for the detention and the representation of the detenu, if any [S. 3 (2)]. (6) Submission of its report by the Advisory Council to the Provincial Government [S. 3 (4)]. (7) Order of the Provincial

12. [1917] A.C. 260
13. [1949] M.W.N. 105 : Cr. 33
14. [1945] M.W.N. 546; Cr. 94
15. [1943] M.W.N. 612; Cr. 149
16. [1945] M.W.N. 445 : Cr. 91 : I.L.R. 24 Pat. 187.

Government confirming or cancelling or modifying the order made under S. 2 (1) [S. 3 (5)].

The first and second steps above enumerated are connected with the initial detention. Before at all exercising the power of detention and passing an initial order therefor the Provincial Government or its duly empowered delegate, must be satisfied that a person is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. This is a fundamental requisite essential to give jurisdiction to the detaining authority to act. It is the satisfaction of the detaining authority that matters. It is a personal or "subjective" and not an impersonal or "objective" standard of satisfaction. The court cannot examine the conscience of the detaining authority to find out whether its reasons for satisfaction were sufficient. No outside decision is involved in this matter of satisfaction which rests solely with the detaining authority. The detaining authority can act on hearsay evidence and is not bound to derive its satisfaction from legal evidence. The information on which it acts is likely to be of a confidential character which need not be communicated to the detenu or disclosed in Court. If the detaining authority has acted in good faith and has come to decision on relevant materials placed before it that detention is necessary, the Court cannot enquire into the sufficiency of the materials or reasonableness of its satisfaction in regard to the matters of which it is required to be satisfied.

It is open, however, to the applicant, if he can, to establish that the detaining authority has not exercised its mind on the materials placed before it and has not satisfied itself about the necessity for the detention and therefore the order for detention, though purporting to be passed under s. 2(1)(a), must be deemed not to be an order under the section. If there is sufficient material before the Court for holding that the recital in the order is inaccurate and that the order is merely a routine order mechanically passed or the mere outcome of police recommendation and not of a decision on the part of the detaining authority under S. 2 (1) then this court would interfere under S. 491, Cr. P. C. *Sibnath Banerji's Case*[14] *on appeal from the decision in the Federal Court* [15] and *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[1]. *S.*3 (1) requires the Provincial Government to communicate to the detenu the grounds on which an order for his detention has been made against him together with such particulars as it considers necessary to enable him to make a representation against the order for detention. If the grounds and particulars furnished disclose that the detaining authority had not exercised its mind at all or had applied its mind to and acted upon considerations wholly irrelevant to and outside the ambit and scope of S. 2 of Act 1 of 1947, then, I should think it is open to this Court to hold that the detaining authority had not the requisite satisfaction regarding the necessity for detention and that the detention is bad for that reason. It has been held in England that where the return to an *habeas corpus* consists of a narrative of facts, it will be bad if the facts stated do not show a legal cause for the detention.*

It is not permissible for this Court to go into the correctness of the facts alleged by the detaining authority but it is equally clear that accepting the facts at their face value, the Court can say that the satisfaction of the detaining authority is not a real satisfaction or a satisfaction in accordance with law. In *Liversidge's Case* [2] Lord Wright said: "Satisfied" must mean reasonably satisfied. It cannot import an arbitrary or irrational state of being satisfied." Suppose a person convicted of cheating, forgery, or murder, served his sentence ten years ago and is detained under S. 2 (1) (a) of Act I of 1947 on the ground of his previous conviction and his consequent undesirable antecedents. This Court is entitled to say that the detention is bad either because the detaining authority had not exercised its mind at all on the relevant considerations or because that the satisfaction of the detaining authority which is required by S. 2(1) did not exist. Similarly, if a person is detained merely on the grouud of his religious, political or economic beliefs and opinions or because he is addicted to some personal vice, without anything relating to the maintenance of public safety or order appearing from the grounds then also the detention would be held to be bad for the same reasons. Even if a person had been conv[illegible]d of an offeuce involving a breach of the public peace, still, if the event happened in the remote past and the satisfaction of the detaining authority does not relate to conduct persisted in after the coming into force of Act I of 1947, the detention would be bad. I do not mean to suggest that antecedent conduct would not furnish reasonable grounds for finding out the present attitude of a person and

*R. v. Jackson [1891] I.Q.B. 671

for coming to a conclusion that he is acting or likely to act in a manner prejudicial to the public safety or maintenance of public order. All that I mean is that acts done in the proximate and immediate past and not in the remote past should alone be relied upon to obtain the satisfaction that is required under S. 2 (1).

If the grounds and particulars furnished under S. 3 (1) are within the ambit and scope of and relevant to S. 2 (1), then this court is not entitled to say that the materials were too slender or too untrustworthy to furnish satisfaction to the detaining authority. Sufficiency of the relevant material or the reasonableness of the inference to be drawn from such relevant material is not for this court to enquire into. Supposing a man attempts forcibly to enter upon another's property and threatens to assault persons who prevent his unlawful entry, and an order for detention is passed against him under S. 2 (1) on the ground that he is likely to act in a manner prejudicial to the maintenance of public order in the locality this court cannot question the propriety of the order, merely because, in its opinion, the incident which led to the satisfaction of the detaining authority is an isolated, trivial or easily avertible threat to public peace or the maintenance of public order. The material is relevant and admissible and the quantum of the evidence as well as the propriety of the inference drawn therefrom are not matters left for the consideration of the court but of the executive which has latitude of choice.

Take a case where the grounds and particulars furnished under S. 3 (1) are such that some of them are within the scope and ambit of S. 2 and some are wholly outside it and the satisfaction of the detaining authority is derived from both of them. It is impossible to say whether relevant and admissible or wholly irrelevant and inadmissible considerations gave the requisite satisfaction to the detaining authority. In such a case detention would be bad. Sir Maurice Gwyer C. J. in delivering the judgment of the Federal Court in *Keshav Talpade's case* [17] (overruled on another point by the Judicial Committee) dealt with such a situation in this way:

> "If a detaining authority gives four reasons for detaining a man without distinguishing between them, and if two or three of the reasons are held to be bad, it (the court) can never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them."

Chagla C. J. in *In Re Raj Dhar Kalu Pattil* [18] dealt with the matter in this way:

> "If a reason is given for the detention of a person which is not within the scope and ambit of the Act conferring the power upon the Government to detain, then the whole order is vitiated notwithstanding the fact that the other reasons given are good, because something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purpose of the Act .... But if some of the grounds given are not outside the scope and ambit of the Act but are merely vague and indefinite, it cannot be said that some extraneous consideration has weighed with the detaining authority in making the order it has made. Therefore, we must draw a sharp distinction between a ground which is outside the purview of the statute and a ground which is bad because it lacks precision and accuracy. In the latter case the ground has to be completely ignored as if no ground was furnished at all."

With these opinions I respectfully agree. I have referred to this aspect of the case at some length because in some of the cases that have come before us, grounds not within the scope and ambit of S. 2 (1) of Act I of 1947 but dealing only with the political affiliations and economic creeds of a detenu and his activities in those fields are stated as grounds for detention. Membership of a party or association which has not been declared an illegal body is prominently mentioned in the grounds communicated to the detenus in some of these cases without any allegation of any acts or facts suggesting that the detenus in question apart from the party in general, were themselves acting or about to act in a manner prejudicial to public safety or maintenance of public order. In such cases the satisfaction of the detaining authority is not a satisfaction about matters relevant to or falling within S. 2 so far as the particular individuals are concerned and that is not a satisfaction which is immune from scrutiny in this court when the legality of the detention is impugned.

I do not consider that the decision of the Full Bench in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1] precludes us from holding that the detention is illegal

17. [1944] M.W.N. 28 : Cr. 28 ; I.L.R. 1944 Bom : 183 F.C.

18. [1948] 50 Bom.L.R. 183 F.B.

because the detaining authority on its own showing, had obtained its satisfaction on a consideration of material irrelevant to and inadmissible under s. 2 (1) of the Act and outside its scope and ambit. It is no doubt true that on an application under s. 491, Cr. P. C., the court cannot enquire into the sufficiency of the materials or the reasonableness of the inference drawn by the detaining authority. The detenu cannot litigate facts and must accept the facts disclosed by the executive authority. But if the reasons which influenced the detaining authority in making the order of detention are disclosed and put on the record by the Government, this court can scrutinise them to find out the condition of the mind of the detaining authority when it made the order. In view, however, of the presumption of regularity and validity attaching to an official order, regular on the face of it, in view of the rule that it is only the satisfaction or state of mind of the detaining authority without reference to any external standard that matters and in view of the power vested in the Provincial Government under s. 3 (1) of refusing to disclose facts which it considers would be against the public interest to disclose it will be difficult for the person challenging an order of detention on the ground above-stated to substantiate his plea.

An order of detention may be bad on the face of it if it does not disclose to the satisfaction of the detaining authority that the person ordered to be detained has acted or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order. See *A. K. Gopalan's case* [13]. In some of the cases which have come before our notice we find the language of s. 2(1) copied mechanically in the orders of detention without specifying whether the detaining authority is satisfied that the person sought to be detained is actually acting in a manner prejudicial to public safety or the maintenance of public order or is about to act or likely to act in such a manner. The cyclostyle forms which incorporate all these three reasons found in the section are not even corrected before the orders are issued so as to indicate which of the three grounds apply to the particular case. One would expect that if more than one of the three enumerated grounds are relied upon in any particular case, the word "or" would be scored out and the word "and" substituted: but even this has not been done. This mechanical reproduction of the language of s. 2 (1) in the cyclostyle orders of detention gives the impression that the empowered authority does not exercise its mind upon the materials placed before it in each individual case, but issues the orders of detention as a matter of course or as a matter of routine without itself being sure about the reason for the detention. In a recent case decided by us Cr. M. P. No. 2633 of 1948 [18] we held on an examination of the terms of the order and the attendant circumstances, that the detaining authority might have satisfied itself that the case came within one or other of the two categories specified in the order without pledging itself exactly to any one of them. We also relied on the observations of Spens C. J. in *Sibnath Banerji's Case* [15] in the Federal Court affirmed on appeal by the Judicial Committee in *Sibnath Banerji's Case* [14] and upheld the validity of the order for detention. It must, however, be confessed that orders framed in the terms above indicated leave a suspicion as to whether the mind of the detaining authority followed the act of signing the detention order. If, however, the grounds and particulars served on the detenu under s. 3 (1) specify the actual grounds on which he has been detained, there is no prejudice to him and the order of detention cannot be questioned on the ground above referred to, *see Green's case* [3].

There are also other matters into which the Court can and will enquire under s. 491, Cr. P. C. if occasion arises, e.g., the *bona fides* of the detaining authority, the authenticity and genuineness of the order of detention itself, the existence of a delegated authority in case the order of detention is passed by a delegate, and the identity of the applicant with the person referred to in the order. So much is clear from the unanimous opinion of the Full Bench in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1].

It is agreed on all hands that lack of *bona fides* or absence of good faith on the part of the detaining authority vitiates an order of detention. The power of preventive detention must be exercised honestly and for the purposes for which it is intended by law and entrusted to the detaining authority. The order should not be a fraudulent or colourable exercise or abuse of the powers conferred by the statute. See *Rex* v. *Halliday* [12], *Liversidge's Case* [2], *Green's Case* [3] and *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1]. It is far easier to formulate this doctrine in the abstract than to apply it to the facts and circumstances of particular cases. If, for instance, it can be demonstrated in a particular case

18. [1949] M.W.N. 547: Cr 139

that the order of detention was actuated by personal malice or hostility or political animosity or that its subject or design was merely to prevent a person or body of persons from the pursuit of a lawful activity for fear that it might be prejudicial to the pecuniary or political interests of other persons or groups, the order would be illegal as being a *mala fide* exercise of the power of preventive detention. If an order for detention is made, not in the interests of public safety or the maintenance of public order, but for the purpose of securing the detention in prison of a person who cannot be successfully prosecuted for an offence of which he is merely suspected, then it would be a *mala fide* exercise of the power. If a person who has been serving a sentence of imprisonment in jail for a pretty long period, say two years, is served on the day of his release with an order of detention under s. 2 (1) (a) the order for detention is in effect an illegal extension of the term of his sentence of imprisonment and would be a *mala fide* exercise of the power. In such a case it could not be said that he was acting or was likely to act in a manner prejudicial to public safety at the moment of his release. Similarly, if a person gets an order for his release on bail from a competent court and just when he is actually released, an order of detention is made so as to nullify the order granting bail and for the purpose of confining him in jail during his trial for offences with which he is charged, it would be a *mala fide* exercise of the power conferred by Act I of 1947. If the primary purpose and avowed intention of the order of detention is only to circumvent the orders of bail issued by Criminal Courts, then it would be a mala fide exercise of the power under S. 3 (1): See *In Re Srinivasan*. Cr.M.P. No. 43 of 1949 [19].

In this connection I must notice a point that is raised in some of the applications questioning the validity of an order for the detention of a person already arrested under S. 151, Cr. P. C. for a cognizable offence and remanded to custody. It is argued that the action of the detaining authority in resorting to Act I of 1947 and passing an order under S. 2 (1) (a) when it has evidently realised that there is no case against the applicant under the penal law of the land, if by itself proof of mala fides. We have already repelled this contention in our judgment in *Cr. M. P. No.* 2633 *of* 1948 [18] and held that merely because the order for detention is made where the person concerned has already been arrested under s. 151, Cr. P. C. the order cannot be said to be mala fide. We must not however be understood as laying down that in no case could an order of detention passed against a person already in custody be said to be mala fide. We have an instance of a man who was detained in jail for over three months under s. 117, Cr. P. C. for refusing to execute an interim security bond. Instead of pursuing the proceedings initiated against him under s. 107 Cr. P. C. and giving him an opportunity to substantiate his defence under s. 118 of the Code, the Police dropped those proceedings and moved the District Magistrate for an order under s. 2 (1) (a) of Act I of 1947. The order for detention was passed on the ground that because the applicant (who stoutly protested his innocence all along) refused to execute an interim bond for keeping the peace he was likely to act in a manner prejudicial to public safety. His refusal to execute an interim bond did not mean or even imply that he was acting or was about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order and an order for his detention passed under s. 2 (1) (a) of Act I of 1947 based on a refusal of the applicant to execute an interim security bond would be a *mala fide* exercise of the power.

Where there is a limited statutory power of interference with the liberty of a person, the power must be exercised *bona fide* for the end specified in the statute. Otherwise, it will constitute a fraudulent exercise of the power and an order based on such a fraudulent exercise of power would be bad. "Fraud" in this connection does not involve or imply moral turpitude but is used to denote the exercise of a statutory power for purposes foreign to or outside the intendment of the statute, however laudable otherwise the intention of the person exercising the power may be. The fraud or mala fides consists in exercising the power for purposes foreign to those prescribed by the statute. The further question that arises is, whether, assuming the initial detention to be legal, non-compliance with the other requirements of Ss. 2 and 3 of Act I of 1947 renders the continuance of the detention illegal.

The powers conferred upon the Provincial Legislature under the Government of India Act, 1935, (Schedule VII, list 2 entry No. 1) as well as the preamble to Act I of 1947 and ss. 2 and 3 of the Act, make it clear that it is only preventive detention for a specific period and

19. [1949] M.W.N. 277 : Cr. 77

not an arbitrary detention or imprisonment for an indefinite time at the pleasure of the executive that has been authorised by Act I of 1947. In an ordinary criminal trial, the accused is given detailed information and particulars about the alleged offence, the prosecution adduces evidence, the accused is given a right to rebut it, and conviction and sentence follow if the offence is found to be proved. Section 2 of Act I of 1947 abrogates trial by a Court and empowers the Provincial Government or its delegate, straightaway to imprison a man if it is satisfied that he is acting or is about to act or likely to act in a manner prejudicial to public safety or maintenance of public order. It will be observed that no time limit is prescribed for the communication of the grounds and particulars under S. 2 (2), for the communication of the grounds and particulars to the detenu under S. 3 (1), for the despatch of the representation of the detenue to the Advisory Council along with other materials under S. 3 (2), for the submission of the report of the Advisory Council under S. 3 (4) or for the passing of the final orders of the Government under S. 3 (5). It is a distressing feature of some of the cases that have come under our notice and a circumstance that has caused us considerable uneasiness, that the applicants have been in jail for periods ranging from four months to one year pursuant to an initial order of detention without final orders having been passed by the Provincial Government. In other words, the applicants have had to endure imprisonment for a much longer period than the period of six months they would have to undergo, even if the initial order for detention had been confirmed by the Provincial Government under S. 3 (5).

Another ground of complaint has been that the grounds communicated to the applicants are vague and general and lacking in precision. One of the paragraphs common to all the grounds is that the communist party to which the applicants belonged was indulging in violence and subversive activities and that most of the members of the party had gone underground and were committing various crimes like arson, looting, murder, etc. The grounds have been expressed in such a form as to be universally applicable to all people who profess to belong to the party without reference to the acts and conduct of the particular individual detained. I shall revert to this aspect of the matter later in the course of this judgment.

The question that arises for consideration is whether it is open to this court to order the release of a detenu under S. 491, Cr. P. C. for the reason that there has been a non-compliance with the provisions of S. 2 (2) or S. 3 (1), (2) and (5) of the Act either by reason of an inordinate and unreasonable delay in taking the requisite steps or otherwise. It is argued that non-compliance with the formalities directed to be carried out by Ss. 2 and 3 of the Act after the exercise of the statutory power of detention under S. 2 (1) (a), will not have the effect of invalidating the exercise of the power and the order of detention. In other words, it is said that the subsequent formalities prescribed in the various provisions following S. 2 (1) (a) of Act I of 1947 are not essential to the validity of the order of detention and their non-observance would not in any way render the detention illegal. Support for this contention is to be found in the observations of Subba Rao, J. who delivered the judgment of the Court in *Venkataraman* v. *Commissioner of Police, Madras* [6]. In that case an order for detention of the applicant was made under S. 2 (1) (a) by the Commissioner of Police on 1—4—1948 and communicated to the Government under S. 2 (2) on 9—6—1948. The applicant was arrested only on 17—8—1948 as he could not be found till then and was subsequently served with the grounds for his detention. The applicant relied on the inordinate delay in communicating the order of the Commissioner of Police to the Government under S. 2 (2) as invalidating his detention. The Court held that inasmuch as the initial order and the grounds thereof had been communicated to the Government and the applicant had been given a copy of the grounds and the necessary particulars and had also submitted his explanation at the time when the application under S. 491 came on for hearing before the Court, the inordinate delay of more than two months in the communication of the order by the Commissioner of Police to the Government was a mere irregularity which did not render his detention illegal. A detenu who had made himself scarce for more than two months after the order for his detention was made and who could not therefore be arrested, could not reasonably be heard to complain of the *interim* delay in the communication of the order. The judgment however contained the following observations of a general nature :—

"If the order was valid at its inception we cannot see how it would become invalid by the subsequent non-compliance with the other provisions of the Act .... Assuming that in view of this enormous delay, it must

be held that the provisions of the section have not been strictly complied with, would it have the effect of invalidating an order that had been validly passed? We think not. Once an order has been passed in strict compliance with the provisions of S. 2 (1) it was validly passed. Ss. 2 (2) and 3 (1) were designed to provide a machinery for the person against whom an order has been passed to seek redress as early as possible. If a statutory authority did not comply with the provisions of S. 2 or 3, there may be other remedies open to the aggrieved party; but in our view, the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under S. 2 (1) cannot in law invalidate an order validly passed under S. 2 (1).............. The argument of Mr. Pillai (Counsel for the detenu) was that assuming the order passed under S. 2 (1) was valid at its inception and continued to be so, the further detention after the violation of the provisions of S. 2 (2) was illegal. This argument ignores the distinction between an order of detention and the procedure prescribed for enabling an aggrieved party to seek redress. ....If the authority concerned did not carry out his statutory duty, the petitioner could have taken the appropriate remedy to compel him to perform his duty. He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned. But in our view, the non-compliance with the provisions of sub-sec. (2) S. 2, could not make the detention illegal."

In another case, *In re Venkatachala Thevar* [20], a copy of the grounds of detention under S. 3 (1) was served after a delay of 22 days after the detention and after the filing, but before the hearing of an application under S. 491, Cr. P. C. in this court. This court characterised the delay as unconscionable but held that the irregularity had been cured by the time the application was heard. The relevant portion of the judgment is as follows:

"However, even if in the absence of an order furnishing the reasons under S. 3 (1) within a reasonable time, we might have held that the detenu had been unlawfully detained, we would not order his release after the reasons had been furnished and the detention became lawful."

This decision seems to assume that the continuance of the detention might become unlawful if there is unreasonable delay in serving the grounds under S. 3 (1).

Though the learned Judges who decided *Venkataraman's case* [6] do not cite any authority, they were perhaps relying upon the observations of Goddard L.J. in the Court of Appeal and of Lord Macmillan in the House of Lords in *Green's case* [3] couched in similar language. I shall examine *Green's case* [3] presently but before doing so, I may point out some of the consequences of the view taken by the learned Judges. S. 2 of Act I of 1947 does not require that the order of detention should be served on the person ordered to be detained before he is arrested and indeed it does not even require a written order, though in practice such an order is made. According to the Full Bench decision in *Narayanaswami Naidu's case* [1] an order of detention based on the personal satisfaction of the detaining authority that the person detained is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order is all that is required to make the contention legal *ab initio*. The only grounds on which the legality of the initial detention can be challenged are (1) that the order was not duly authenticated, (2) that there has been a mistaken identity, (3) that there has been an absence of good faith, and (4) that there was not on the facts stated or disclosed by the Government, any such satisfaction in the mind of the detaining authority as is required by S. 2 (1). The learned Judges in *Venkataraman's case* [6] held that a detention legal *ab initio* does not become illegal even though the formalities prescribed by S. 3 are not complied with and therefore the remedy under S. 491, Cr. P. C. does not lie, whatever other remedies may be open to the prisoner in respect of such non-compliance. Goddard L. J. in the Court of Appeal in *Green's case* [21] made similar observations citing the remedy by way of mandamus. But the writ of mandamus does not lie in India against the Provincial Government or mofussil authorities. Nor is the remedy by way of damages for false imprisonment available, assuming that money can compensate a man adequately for the unjust deprivation of his freedom. The remedy by habeas corpus and the claim for damages for false imprisonment are both founded on the illegality of the restraint or imprisonment and if according to the learned Judges in *Venkataraman's case* [6], a detention *ab initio* legal does not become

20. [1948] M.W.N. 486 : Cr. 106

21. [1942] 1 K.B. 87 (113).

illegal by reason of non-compliance with the terms of S. 3. I am unable to visualise any remedy except by way of appealing to the sense of justice and fair play of the Government. But the absence of an effective remedy, though a relevant consideration, is not a conclusive argument if the interpretation of the Act is clear or if the decision in *Greene's case* [21] has authoritatively laid down the law in the sense in which it has been declared by the learned Judges.

To turn to the facts of *Greene's case* [21] and [3] Mr. Green was arrested under an order of the Home Secretary under Reg. 18 (B) of the Defence Regulations. The order served upon him stated that he was a person of "hostile assocítions" within the meaning of Cl. (1. A) of the Regulation and that by reason thereof, it was necessary to exercise control over him. By clause (3) of the Regulation the detenu was given a right of appeal to an advisory committee constituted under the Regulation on the lines of the Advisory Council under Madras Act I of 1947. Clause 5 of the Regulation casts on the Chairman of the committee the duty of informing the objector, of the grounds on which the order had been made against him, with such particulars as were, in the opinion of the Chairman, relevant and sufficient. The notice from the Chairman instead of specifying "hostile associations" under clause (1 A) as the ground of detention, referred to "acts prejudicial to public safety, defence of the realm etc."coming under clause (5) of the Regulation as the ground of detention. The particulars furnished to the detenu, however, related mostly to "hostile associations." The detenu appeared before the Advisory Committee and put forward his case without complaining about the discrepancy in the notice issued by the Chairman of the Advisory Committee. The Advisory Committee and the Home Secretary confirmed the initial order of detention. An application for a writ of *Habeas Corpus* was made. The argument on behalf of the detenu, relevant to the present purpose, was that the discrepancy between the order for his detention and the subsequent notice issued by the Chairman of the Advisory Committee made the detention illegal *ab initio* or alternatively, from the date of notice. This contention was repelled both in the Court of Appeal and in the House of Lords on the ground that the defect complained was a defect in procedure and a mere irregularity which did not prejudice the applicant. The following observations of the Court of Appeal and the House of Lords taken together and in their context, show, in my opinion, that their Lordships contemplated not only the possibility of the detention being illegal *ab initio* but its continuance becoming illegal, for proper and sufficient reasons.

Scott, L. J.: "As a matter of law I cannot see anything in the Regulation which would justify the conclusion that such a mistake by the Advisory Committee either invalidates an originally good order or confers a right to release" (page 106).

Goddard, L. J.: Moreover a mistake in the document served on him after he was in custody cannot, in my opinion, invalidate the original detention or render its continuance invalid. It is the actual order signed by the Secretary of State that is the governing document and it is this document that the return should disclose" (page 117).

Viscount Maugham.: "I also agree with their view (the Court of Appeal) that a mistake in that document could not, in any event, invalidate the original detention or render its continuance invalid" (p. 296).

Lord Macmillan.: The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention". (p. 298)

Lord Wright. "I see no reason to differ from the opinion of the court below that this irregularity does not vitiate the order made and continued." (p. 300).

Lord Romer: "This mistake cannot affect the validity of the order that had been made by the Home Secretary nearly two months before. Had the appellant been prejudiced by the mistake, the court might nevertheless have afforded him some relief. But the matter was carefully considered both by the divisional Court and the Court of Appeal." (pp. 309–310)

I do not consider that the above decision taken as a whole, supported the general proposition laid down by the learned Judges in *Venkataraman's case* [6]. There is no question here of nullifying the effect of a prior judicial order. S. 2 (1)(a) of Act I of 1947 merely provides for physical detention by a summary order and it is only at a later stage that the grounds and reasons for the order have to be formulated and canvassed and a final order passed. Neither the language of the section nor any binding authority compels me to hold

that once the preliminary order for detention is made under s. 2 (1) (a) everything that follows the order is a mere matter of procedure and non-compliance with it is a mere irregularity not affecting the substantive rights of the detenu.

It is as well that I further consider the matter on principle and authority. In so doing I may draw attention to the observations of Brett L.J. in *Dales case* [7]. It was a case of a person who was arrested without due compliance with the technical formalities prescribed by statute. An application was made for a writ of *habeas corpus* on the ground that his arrest and detention were illegal. Brett L. J. stated the law in these terms:

> "It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity, the court will not allow the imprisonment *to continue*. The question here, therefore, is whether the promoters *after the matter had been properly signified to the Court of Chancery have proceeded regularly*. In my opinion they have not." (Italics are mine.)

Later in the course of his judgment the learned Lord Justice observed :

> "I desire to state that although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the courts at Westminister will not allow any individual in this kingdom to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process just to procure that imprisonment. I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects."

Cotton L.J. agreed with the above observations in these terms :—

> "I quite agree with Brett L.J. that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form." (469)

To the same effect is the decision of the Judicial Committee in *Ezhugbayi Eleko v. Government of Nigeria* [22]. In dealing with a question relating to the regularity of forfeiture of a man's property where some of the steps regulating the exercise of the power of forfeiture had not been duly complied with, James L. J. observed as follows:

> "It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as factal as the greatest. Here the notice is inaccurate. It is therefore bad and the forfeiture is invalid."

Mellish L. J. stated as follows:—

> "I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs. It is a bad notice and the subsequent resolution, which is founded upon it, is invalid." *Johnson v. Lyttle's Iron Agency* [23].

Forfeiture of a man's property or personal freedom can result from the exercise of a power conferred by statute on executive authority and without the intervention of a Court, but to have that effect, the power must be exercised in strict compliance with the formalities and requirements prescribed by the statute. It is open to the person aggrieved by the exercise of the power to question the legality of the forfeiture or arrest and imprisonment on every available ground of non-compliance with the provisions of the statute. In *Pramela Devi's Case* [24], the Judical Committee observed that in the matter of forfeiture of shares in a limited company the formalities prescribed by the articles regarding the issue of notices must be strictly observed. Imprisonment except under a sentence or order of a court is *prima facie* unlawful and the person or authority directing such imprisonment must justify the act in law.

It is true that the legislature in view of the emergency that it was providing against, has authorised detention under S. 2 (1) (a) even before informing the person sought to be detained of the grounds for his detention and hearing his explanation. If the statute had authorised detention after service of the grounds of detention and after consideration

22. [1931] A.C. 662 (670)
23. [1877] 5 Ch. D. 687
24. [1939] M.W.N. 78 ; I.L.R. 20 Lah. I.PC

of the explanation, if any, of the person affected, it could hardly be contended that the provisions as to the service of grounds and the giving of an opportunity for explanation are not conditions precedent to the exercise of the statutory power of detention. The provisions would then be considered to be mandatory in character. Do they cease to be such merely because by reason of the urgency of the situation, these formalities are directed to be complied with subsequent to the initial order of detention? Is the initial order of detention of greater effect than an interim order passed in a pending judicial proceeding which requires confirmation after notice to the opposite party and hearing his objection? To take another analogy furnished by the Civil Law, does not a condition subsequent have as great an efficacy as a condition precedent in connection with the vesting and divesting of rights in property and is not non-performance or non-compliance with either the one or the other condition, equally fatal? In view of the emergent situations that were in its contemplation and in view of the fact that there might not be enough time to serve a person with notice and hear his objections before detaining him so as effectively to prevent an apprehended breach of public peace or order, the legislature authorised an immediate detention under S. 2 (1) (a). But in my judgment substantial compliance with the formalities prescribed by s. 2 (2) and s. 3 (1) to (5) is quite essential to sustain the legality of the continuance of the detention. They are not merely directory provisions whose non-observance would constitute a mere irregularity in procedure. If the non-compliance with the provisions of s. 2 (2) and s. 3 is substantial and serious, it would render the continuance of the detention illegal even though it might have been legal *ab initio*. It is not uncommon to find in other fields of law provisions for interim suspension, without previous notice, even of persons holding a freehold or hereditary office pending enquiry into their misconduct. The nature of the office may be such that instant suspension from the functions of the office without notice and without giving time for explanation would be necessary in public interest. This interim suspension is different from a punitive suspension and is merely incidental to the power of removal or dismissal. If the interim suspension is allowed to continue indefinitely without any enquiry into the alleged misconduct, then it would be a fraud on the power or a *mala fide* exercise of the power. The position would be the same if an order for dismissal is passed without giving an opportunity to the persons affected to explain charges of misconduct that might be made against them. In such cases, the aggrieved person would have his remedy in the Civil Courts. The fact that an interim or initial detention is legal does not secure for it immunity from attack if the subsequent formalities prescribed by s. 2(2) and s. 3 of Act I of 1947 are not substantially complied with and the continuance of the detention would become illegal by reason of such non-compliance. Any other construction would result in conferring upon the executive a power of arbitrary detention for an indefinite period which certainly was not the object or intention of the legislature in enacting Act I of 1947. That the continuance of a detention *ab initio* legal, might become illegal by reason of a non-compliance with the mandatory provisions of s. 3 (1) was, in substance, the view taken by Horwill and Govinda Menon, JJ. in Cr. M. P. No. 2128 of 1948 and by my learned brother and Rajagopalan J in Cr.M.P. No. 200 of 1949 and 91 of 1948. The same view has been taken by Full Bench decisions of other High Courts (See *Murat Palwa* v. *Province of Behar* [25], *Nek Muhammad* v. *Province of Behar* [26], *Durga Das* v. *Rex* [27], *Inder Prakash* v. *Emperor* [28] and *In Re Raj Dhar* [4]. The Full Bench decision in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram* [1] dealt only with the challenge against the validity of the initial order of detention and did not consider the question whether the continuance of the detention which was legal at its inception could become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do. (See the observations of Govindarajachari, J. at page 31 of the report.)

The statutory formalities whose non-compliance renders the continuance of the detention illegal may now be briefly noticed so far as they are relevant to the cases heard by us. An order made by an empowered authority under s. 2 (1) (a) has to be reported forthwith to the Provincial Government together with the grounds of detention and necessary particulars. Under s. 3 (1) the Provincial Government has to communicate to the detenu the grounds on which the order

25. [1949] A.I.R. Pat. 135
26. [1949] A.I.R. Pat. 1 F.B.
27. [1949] A.I.R. All. 48
28. [1949] A.I.R. All. 37

for his detention has been made together with relevant particulars. S. 3 (2) requires the Provincial Government to place the grounds and the order of detention, the report, if any, received under s. 2 (2) and the representation of the detenu before the Advisory council. S. 3(4) requires the Advisory Council to submit their report to the Provincial Government after a consideration of the materials placed before it. The Provincial Government, after considering the report of the advisory Council is required to pass an order, confirming, modifying or cancelling the order of detention under s. 3 (5). As I have already stated, there have been instances of inordinate delay at every one of the stages enumerated above, in the applications that we have heard. I have no reason to doubt that these delays were due to inadvertance, administrative difficulties and also perhaps, to a lack of appreciation of the heavy responsibility taken by the Provincial Government in constituting itself both an accuser and a Judge. It is true that there is no time limit fixed by the Act for the performance of the duties above enumerated but the result in law is that these steps have to be taken expeditiously and within a reasonable time, *Murat Patwa* v. *Province of Behar* [25]. What is a reasonable time must, to some extent, depend upon the circumstances of each case. The general principle regulating the time factor in these cases is thus stated by Horwill J. in *In re Venkatachala Thevar* [20]:

> "It is sufficient to point out that the very magnitude of the powers given to the Government under this Act adds to their responsibility to see that no man is incarcerated a day longer than is necessary without giving good reasons for it."

To the same effect are the observations of Subba Rao, J. in *A. K. Gopalan* v. *District Magistrate, Malabar* [13]. Where the delay in communicating the grounds under s. 3 (1) or in submitting the case to the Advisory Council under s. 3 (2) or in passing final orders under s. 3(5) is unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground. (See *Murat Patwa* v. *Province of Behar* [25], *Durga Das* v. *Rex* [27] Cr. M. P. No. 2128 of 1948 and Cr. M. P. Nos. 91 of 1948 and 200 of 1949.)

Another ground of non-compliance with statutory formalities urged before us in some of these applications is that the grounds communicated to the applicants are so vague and so devoid of particulars that it is not possible for them or any one in their position to make any effective representation against the order of detention. It cannot be said that, if this allegation were true, there is merely a breach of a directory provision contained in S. 3 (1) and a mere irregularity not affecting the legality of the detention. S. 3 (1) casts a presumptory duty upon the Provincial Government to furnish the detenu with all the grounds of detention together with the necessary particulars so as to enable him to make a representation against the legality or the propriety of the order of detention. This object would be frustrated if the grounds are vague and general without any particulars and without attempt at precision or accuracy. This provision is meant as a safeguard for the subject against arbitrary detention by the executive and it is our duty to see that this safeguard is not whittled away in practice. The grounds and particulars must not be vague, indefinite or incomplete but must convey sufficient information to the detenu to enable him to make an effective representation, supported by facts and figures, if necessary that the detaining authority was wrong in its belief that his detention was necessary in the interests of public safety or the maintenance of public order. The grounds must contain sufficient details to show that the detention was within the scope and object of the Act. If in the opinion of the court, the grounds furnished are so vague, indefinite and insufficient, that the detenu could not fairly be expected to make an effective representation against the legality or propriety of the order for detention then, it must be held that his further detention is illegal or improper. The word "grounds" in S. 3 (1) does not merely mean the conclusions of the Government or abstract reasons for their action. They must by themselves or along with particulars which are required to be furnished, include facts and circumstances on which the conclusions or reasons are based. If activities which are normally unobjectionable are considered to be objectionable and therefore relied upon as a ground for detention, then, the circumstances in which or the reasons why those activities are looked upon as objectionable must be indicated to the detenu. The grounds and particulars together form a sort of substitute for a charge. General, vague and indefinite grounds are no grounds at all and the detenu should not be left to his own introspection or guess work to find out what is being alleged against him.

It is true that facts, grounds and particulars may and often do overlap and that under S. 3

the Government is not bound to disclose facts which it considers against the public interest to disclose. The Government is also given the direction to furnish only such particulars as are, in its opinion, sufficient to enable the detenu to make a representation to the Government. The section draws some but not a clear distinction between grounds and particulars and requires the authority to communicate all the grounds and such particulars as are, in its opinion, sufficient to enable the detenu to make a representation against the order of detention. While facts can be withheld by the Provincial Government on the ground that their disclosure would be prejudicial to the public interest, grounds and particulars cannot be withheld for that reason. It must be remembered that the only opportunity the detenu has of vindicating his character and defending his liberty is to make a representation to the Government under S. 3 (1) and it is but fair and reasonable that the grounds and particulars furnished to him should be clear, precise and accurate. Otherwise they would fail to serve the purpose for which they were required to be communicated to him. The detenue must know what he is charged with and what reasons or considerations have persuaded the Government to deprive him of his liberty. There is no doubt a discretion given to the Government in the matter of furnishing particulars but if the particulars are given in such a way as to make it impossible for the detenu to make an effective representation against the order for detention, then we must hold that there has been a failure to comply with the mandatory requirements of S. 3(1) and the detention becomes illegal thereafter. Having regard to the nature of the grounds that have been alleged against the applicants in many of the applications before us it is necessary to point out that mere membership of a political party or association would not mean that any particular member was acting in such a manner as to necessitate his detention. The grounds and particulars referred to in S. 3 (1) must relate to the particular individual who is detained and must disclose the facts which led to the belief that he was acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. The question is one of substance on the facts and the circumstances of each case and the applicant will have to satisfy the court that the grounds and particulars communicated to him are so vague and indefinite that there has been no compliance in substance and in effect with the requirements of s. 3(1) of the Act. There is a considerable body of authority in the High Courts of Allahabad, Patna and Bombay for the views above stated. (See *Durgadas* v. *Rex* [27], *In Re Raj Dhar* [4] and *Nek Muhammad* v. *Province of Behar* [26] *In re Krishnaji Gopal* [29].

With reference to the individual cases that have been argued before us, I agree with the conclusions of my learned brother. In view of the importance and frequent recurrence of the questions that I have discussed above, I have added my own observations.

N.T.R.

—

Cr. App. No. 608 of 1948
July 20, 1949

PANCHAPAKESA AIYAR, J.

THE PUBLIC PROSECUTOR
v.
B. NAGAMMA

Prevention of Adulteration Act (*Mad. Act III of* 1918), *Ss.* 3 & 18—*Initiation of prosecution—Public Health Act* (*Mad. Act III of* 1939) *s.* 16—*District Health Officer—Local executive officer.*

Under s. 16, *Public Health Act, a district health officer must be deemed to be the local executive officer and under S.* 3, *Prevention of Adulteration Act the district health officer as local executive officer can delegate his powers and duties under the Act including his powers under s.* 18 *and the person to whom the powers under s.* 18 *have been delegated could validly initiate a prosecution under the Prevention of Adulteration Act.*

Appeal under s. 417 Cr.P.C., 1898, against the acquittal of the aforesaid Respondent (accused) by the Sub-Divisional Magistrate of Jammalamadugu in C.A. No. 128 of 1948 on his file (C.C. 890 of 1947 Stationary Sub-Magistrate, Jammalamadugu).

Public Prosecutor (*V. L. Ethiraj*) in person.
A. Bhujanga Rao, for Respt.

JUDGMENT

The respondent was the accused in C.C. No. 800 of 1947 on the file of the Stationary Sub Magistrate, Jammalamadugu, a case under s. 5(1)(d) of the Madras Food Adultera-

29. [1948] A.I.R. Bom. 360

tion Act, for sale of milk adulterated with water to an extent of 57 per cent. The Sub-Magistrate convicted the respondent and fined her Rs. 150. The Sub-Divisional Magistrate, Jammalamadugu, on appeal, held that the prosecution had not been instituted by the 'local executive officer' but by the Executive Officer, Jammalamadugu Panchayat Board and acquitted her. The Government have filed an appeal against the acquittal.

The learned Public Prosecutor urged that under s. 16 of the Public Health Act a District Health Officer must be deemed to be the local executive officer, and under s. 3 of Madras Act III of 1918 (the Madras Prevention of Adulteration Act) the District Health Officer as local executive officer, can delegate his powers and duties under the Act (including his powers under s. 18) to such persons as might be prescribed and had delegated his powers under s. 18 to the Executive Officer, Jammalamadugu Panchayat Board, who had initiated the prosecution. I agree. Govinda Menon, J. has also in his judgment dated 30—10—1947, in Cr. App. No. 341 of 1947, come to the very same conclusion and has upset an acquittal, on identical facts. I set aside the acquittal of the respondent. There is no need to order a re-trial as the facts are clear, and the milk was more than half water. But in view of the fact that the learned counsel appearing for Government have not raised the point before the Sub-Divisional Magistrate, and relied on the judgment of Govinda Menon J. (which was unfortunately not reported and so did not act as a deterrent to such pleas), I let the respondent off with a fine of five rupees, or five days simple imprisonment, in default, while convicting her under s. 5 (1) (d) of the Act.

N.T.R.

—

Cr. P. C. No. 885 of 1949
Cr. R. P. No. 821 of 1949
July 29, 1949)

PANCHAPAKESA AIYAR, J.

A. GOVINDASWAMY & others
v.
THE KING

City Police Act (*Mad. Act III of* 1888) *s.* 75—*Scope of—Criminal Procedure Code* (*V of* 1898) *s.* 106—*Action under.*

S. 75 *City Police Act is not restricted to riotous, disorderly or indecent behaviour as a result of being drunk but also makes punishable people guilty of riotous, disorderly or indecent behaviour without being drunk in a perfectly sober mood.*

Where the petitioners had no antecedents of crimes involving a breach of the peace and all of them acted in a sudden heat of passion an order under S. 106 *Criminal Procedure Code is not justified.*

Petition under Ss. 435 and 439 Cr. P. C. 1898 praying the High Court to revise the judgment of the Fifth Presidency Magistrate of the Court of the Presidency Magistrates Egmore, Madras, in N. C. 60277 of 1949.

N. S. Mani for Row and Reddy, for Petrs.
Crown Prosecutor (*S. Govind Swaminathan*), for Crown.

ORDER.

The petitioners have been sentenced under S. 75 of the City Police Act to undergo three weeks rigorous imprisonment each for behaving in a riotous, disorderly or indecent manner and have also been directed to execute bonds themselves for Rs. 50 each with one surety for Rs. 50 each for six months after release under S. 106 Cr. P. C. Mr. Mani, for the petitioners, urged that S. 75 would apply only to persons guilty of riotous, disorderly or indecent behaviour as a result of being drunk, and not, as here, without being drunk and in a perfectly sober mood. I cannot agree. S. 75 punishes both drunkards incapable of taking care of themselves, and people guilty of riotous, disorderly or indecent behaviour in any public place etc. like these petitioners. The petitioners abused, in filthy and indecent language, the loyal workers and behaved in a riotous, disorderly and indecent fashion in a public place and were rightly convicted under S. 75. But, considering all the circumstances, I modify the sentences to the periods of imprisonment already undergone and a fine of Rs. 15 each or in default further rigorous imprisonment for a week each. Time for payment till 3 P.M. on 14–8–1949.

There was no justification in the circumstances of this case to take bonds under S. 106 Cr. P. C. from any of the petitioners, none of whom had any antecedents of crime involving a breach of the peace and all of whom had acted in sudden heat of passion on finding their fellow-workers refusing to join the strike and persisting in going on working. The bonds are cancelled.

N.T.R.

—

Cr. R. C. No. 297 of 1949

Cr. R. P. No. 250 of 1949

July 4, 1949

GOVINDA MENON, J.

BAVAJI alias ABDUL MUHAMMAD

v.

THE KING.

Essential Supplies Temporary Powers Act, (XXIV of 1946), *s.* 7 *(1)—G. O. No.* 2660 *A/*45 *dated* 4—9—1945 *prohibiting transport of paddy—Offence under.*

Under cl. 1 *of the G. O. No.* 2660-*A*45 *dated* 4—9—1945 (*which prohibit inter-district transport of paddy without a permit) the offender would be the person who transports the goods. The person who delivers the bags of paddy to certain cartmen to be transported would be guilty only of abetment of the transport.*

In order to constitute an attempt to commit an offence, there must be an intention to commit the crime, a commencement of the commission and an act done towards the commission. Whether there has been an attempt or only a preparation to commit an offence is to be decided on the facts of each particular case. One important consideration in such cases is whether there was a locus penitentiae.

Petition under Ss. 435 and 439 Cr. P. C. 1898 praying the High Court to revise the order of the Court of Sessions, West Tanjore in C. A. 3 of 1949 (C. C. No. 146 of 1948, Additional First Class Magistrate, Kumbakonam).

V. Rajagopalachari, & G. Gopalaswami, for Petr.

Asst. Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER.

The petitioner who was the first accused in C. C. No. 146 of 1948 on the file of the court of the Additional First Class Magistrate of Kumbakonam was convicted for the contravention of an order promulgated by the Provincial Government No. 2660-A/45 (C. S.) published at pages 581 and 582 to Part II of Fort St. George Gazette dated 4-9-1945 which had been continued as an offence by S. 7 (1) of Central Act XXIV of 1946 and sentenced to rigorous imprisonment for one year. The said conviction and sentence were confirmed on appeal by the Court of Session, West Tanjore and the present revision is to set aside the aforesaid confirmation of the conviction and sentence.

P.W.1 was the Grain Purchase Tahsildar of Tanjore in October 1947 and P.W.2, was the Inspector of Police, C.I.D. X branch, Tanjore at the same time. On 3-10-1947 at about 10-30 p.m. both P. Ws. 1 and 2 proceeded along the flood bank shown in the plan Ex. D-5 and found four cart-loads of paddy at the place marked 46/5 on the said flood bank. According to the witnesses, the double bullock carts had gone down the bank in a northern direction into the padugai lands which intervene between the Coleroon river in the north and the flood bank in the south. To the north of the Coleroon river is the Ramanoor Island which formed part of the Trichinopoly district. By the time P.Ws.1 and 2 reached the place in question, the bullocks had been unyoked and the second and the third accused who had been acquitted by the learned Sessions Judge were near the cart. On being questioned accused 2 and 3 told P. W. 1 that the paddy belonged to the first accued. Little later, the petitioner came on the scene and admitted that the paddy was his. He was asked to produce the transport permit, because according to the witnesses, the carts were proceeding towards Trichinopoly district. He did not produce any such permit, but said that the paddy was being taken to Kumbakonam. Since the first accused did not produce the A.A. permit on demand and after P.Ws. 1 and 2 waited for an hour, the paddy was seized under the Mahazar, Ex. P-1, and the witnesses arranged that the paddy should be taken to Kumbakonam to be produced in court. On this evidence, the lower courts have held that the first accused was attempting to transport paddy in contravention of the G.O. above mentioned. Ex. P-4 clause 1 of which is in the following terms :

"No person shall with effect from the date of this order transport paddy.......from any place within the limits of any of the districts specified in column(1) of schedule 1

"........to any place within the limits of any other district in the Province of Madras except under and in accordance with the terms and conditions of a permit issued by the Commissioner of Civil Supplies......."

It is not disputed that there was no permit for the transport of paddy from the Tanjore district to the Trichinopoly district which lies to the north of the Coleroon river at a distance of six furlongs from the flood bank. Half the river belongs to the Tanjore district and the other half on the northern side belongs to the Trichinopoly district on the principle of *ad medium filum*. The learned Sessions Judge found that the act of the second and third accused did not constitute an attempt to transport paddy; but that the first accused committed the offence in question. The learned Judge found that the carts had a considerable distance to go before they crossed the boundary of the district and it was certainly possible for the drivers to repent of their intention to take the carts to Trichinopoly district and give up the attempt. It was further found that when the carts were seized, they were not even moving. Following the decision in *Queen Empress* v. *Ramakka* [1] the learned Judge was of opinion that the action of accused 2 and accused 3 would not amount to an attempt. In paragraph 19 of his judgment, the learned Sessions Judge finds on the evidence that if the first accused had delivered the grain to the carters obviously with instructions to take it into another district and if there had been no interference, the petitioner would not have seen the carts again. According to the learned Judge he had therefore done everything that lay with him and set in train a series of actions that, if they had not been interrupted, would have led to the commission of the offence. He then applies the analogy of a person who books goods by railway transport to a destination to which it is an offence to send the goods and holds that such an act would amount to an attempt to commit the crime. On the above reasoning, the learned judge was of opinion that the petitioner must have instructed the cartmen (second and third accused) to transport the paddy from Tanjore district to Trichinopoly District.

I find it difficult to follow the learned judge's reasoning. A strict construction of paragraph 1 of the G. O. extracted above would show that the offender is the person who transports the goods. It cannot be said that even if the prosecution evidence is true that the petitioner who delivered the bags of paddy to the cartmen (second and third accused) to be taken to the Trichinopoly district would be actually transporting paddy. If the petitioner had done an act like this, it could at the utmost amount only to an abetment of the transport of paddy from Tanjore to Trichinopoly district. The drivers would be the persons who would transport the goods and persons who directs them to do so would be the abettor of the offence. The learned Judge has found that the second and third accused did not commit the crime. He also has found that they did not even attempt to commit the crime. In such circumstances, it is difficult to hold that if the actual participants did not even commit the offence of the attempt to transport, then the person who is alleged to have abetted the act which did not amount to an attempt has committed any offence at all. On this short ground, in my view, the offence has not been brought home to the petitioner.

On the merits also, I am unable to agree with the lower courts that any offence has been committed. There is no evidence whatever that the petitioner directed the second and third accused to take the paddy from the Tanjore district to the Trichinopoly district. P. W. 1 says that when accused 2 and 3 were questioned as to whose the paddy bags were, they replied that the paddy belonged to the first accused, but they did not give any reply to the other question as to where it was being taken. P. W. 2 also gives evidence to the same effect. Therefore, there is absolutely no material on which the Court could come to the conclusion that the paddy was being taken to Trichinopoly. On the other hand, it is clear from the evidence that the first accused had been directed to deliver 1,500 kalams of kuruvai paddy on 6—10—1947 to the Government licensed merchant in Tanjore district. Ex. D-11 shows that towards that quantity 12 carts containing 177 bags had already been delivered and if the contents of the four carts had aslo been delivered to a Government licensed merchant, that would fulfill the obligation imposed upon the first accused, regarding the delivery of the 1,500 kalams of kuruvai paddy. Ex. D-2 the A. A. permit is for 16 carts of paddy to be delivered between 26–9–1947 and 5—10—1947. In these circumstances, in my opinion, the lower courts were not justified in concluding that even if the carts had taken a detour little to the north of the flood bank into the Padugai lands and that at the time P. Ws. 1 and 2 observed the carts the bulls had been unyoked, the only possible inference is

1. [1885] 8 Mad. 5

that the carts were being taken to the Trichinopoly district. P. W. 1 himself admits in cross-examination that when he first sighted the bandies some were on the flood bank while others were on the cart track on the north, and as they neared, the carts on the flood bank went towards the north on the cart track. The evidence of D. W. 13, a retired District Board Engineer, is to the effect that along the flood bank there are a number of vents between various distances and that there are sidings also. Granting that the evidence of P. Ws. 1 and 2 is acceptable—and I do not see any reason to disbelieve the evidence of these respectable witnesses—it cannot be predicted with absolute certainty that the carts were proceeding to Trichinopoly district at all.

The learned Judge's view that it "must have been" in obedience to the instructions of the petitioner that the carts set out to cross the river is not based on any evidence at all, and in a criminal case, unless there is some evidence, no court is justified in concluding that a person has given instructions which would amount to a crime. There is also the evidence of D. W. 2 that all the 16 carts which included the four carts in question reached the Kumbakonam Chowki practically at the same time at 7-30 on the morning of the next day. If the petitioner had sent 12 carts with paddy for the purpose of delivering them to the licensed grain purchaser, the quantity contained in the four carts now in dispute would make up the requisite quantity which he had to deliver. Then it is a reasonable conclusion to draw that the petitioner would have sent the carts not to Trichinopoly district but to Kumbakonam to be delivered to the licensed dealer. The discussion by the learned Judge in paragraph 8 of his judgment is sufficient justification for drawing the inference that the four carts also should have formed part of the 16 carts containing the requisite quantity of paddy to be delivered.

In order to constitute an attempt to commit an offence, there must first of all be an intention to commit the crime, a commencement of the commission, and an act done towards the Commission. Neither the mere forming of the intention to commit the crime nor the mere preparation for an offence is punishable. The dividing line between a mere preparation and an attempt to commit a crime may be rather thin in some cases and the question whether there has been an attempt or only a preparation to commit is to be decided on the facts of each particular case. One important consideration in such cases is whether there was a locus penitentiae—See *Narayanaswami Pillai In Re* [2]. Applying the above principles, it seems to me that on the evidence let in, it cannot be conclusively inferred that there has been an attempt to transport the paddy to Trichinopoly district.

The criminal revision case is therefore allowed and the petitioner is acquitted.

N.T.R. — *Petition allowed*

R. T. No. 83 of 1948
Cr. App. Nos. 445 to 448 of 1948

January 19, 1949.

HORWILL & RAJAGOPALAN, JJ.

PARAMBAN MAMMADU & others.
v.
THE KING.

Evidence Act (I of 1872*), Ss.* 45 & 133*—Approver evidence—Conviction on—Evidence of—Foot Print expert—Value of.*

Where the evidence of an approver is rich in detail and colour, consistent within itself and not having any important contradictions when compared with other statements made by him earlier, very little evidence is necessary to satisfy the court beyond all reasonable doubt that the approver's story is true, but where the approver's story is thin and bare and does not carry with it an air of conviction, very substantial corroboration of the story would be necessary before it would be possible to bring home the guilt of the offence to the accused beyond all reasonable doubt.

The opinion of a foot print expert is not admissible as evidence. If the court is to make any use at all of foot impressions, it must be satisfied from a comparison of the various foot prints that they are those of the persons whom the expert says they are. The value of evidence with regard to foot prints is very much less trustworthy than evidence with regard to finger prints. With regard to foot prints one can only compare the general shape of footprints found with the shape of impressions taken from the feet of the suspected persons. Foot impressions vary considerably according to circumstances under which they are made. Footprints made when a person is walking slowly or fast or running slowly or fast or jumping all create differences which are material. A footprint taken after a person has walked a considerable distance is larger than a foot print taken when a person has been at rest.

2. [1932] M. W. N. 545 : Cr. 97

Trial referred by the Court of Sessions of the South Malabar Division for confirmation of the sentences of death passed upon the said Prisoners in C. C. No. 30 of 1948 on 2—8—1948 and appeals by the appellants against the sentence of death and the sentence of rigorous imprisonment for two years passed on them in the said case.

K. S. Jayarama Ayyar, B. Pocker, K. M. Seethi Sahib, P. A. Quadir Meeran, M. R. M. Abdul Karim & Mahboob Ali Khan, for Accused.

Public Prosecutor (V. L. Ethiraj) for Crown.

JUDGMENT

[Horwill, J.]

The four appellants and three others who were acquitted by the lower court were charged by the Sessions Judge of South Malabar under S. 120-B read with S. 302, I.P.C. of conspiring with P.W. 10 to commit the murder of one Ramasimhan. There was also a charge under S. 148 of being armed with dangerous weapons and rioting. They were further charged under four separate counts for the murder of the said Ramasimhan, his brother Narasimhan, the wife of Narasimhan, and one Raju Iyer, a Brahmin cook of Ramasimhan. These four persons will be referred to during the course of the judgment as deceased Nos 1 to 4 respectively. The learned Judge found the first accused only guilty of conspiracy and the four appellants guilty under Ss. 147 and 34, read with S. 302, I.P.C., on all the four counts. He sentenced the four appellants to death and, as already stated, acquitted the other three.

The motive for the offence is said to have been the enmity borne by the Moplah community in general and the seven accused and P. W. 10 in particular against Ramasimhan and his brother, the second deceased, because they had renounced Islam and allowed themselves to be converted to Hinduism. Narasimhan had subsequently been elevated to Nambudiri rank and had been accepted by the Nambudiri community as one of their number; and to him in marriage was given the daughter of P. W. 26, a girl of 15 years of age, who was with her husband at the time of the murder and shared his fate. After the first deceased had been converted from Islam to Hinduism, he diverted the large sums of money that he was accustomed to contribute to Muslim charities and spent them on Hindu charities. In particular, he renovated a Hindu temple in the vicinity and was responsible for restoring regular worship there. He bagan a diligent study of the Hindu scriptures and was studying the Bhagavad Gita, and had perpetually with him P. W. 25, a Nambudiri, to teach mantrams to the second deceased. He had moreover sent his two sons to Delhi to be instructed and brought up in the Hindu religion. All this, the prosecution say, gave rise to a great deal of enmity against him among Muslims; and specific instances have been spoken to in the evidence in which Muslims were heard denouncing very severely the first deceased and even threatening his life.

Ex. P-60 gives an accurate idea of the bungalow of Ramasimhan, by name "Malaramba Bungalow". The main entrance to the bungalow was on the eastern side. To enter the house one has to pass through a door situate on the eastern side of a porch, which is the entrance to the bungalow. Just inside that door were lying the first deceased and P.W. 24, a boy kept by the first deceased to massage him. This witness was lying on a mat (M. O. 17), which assumes some importance because on it was found a foot print; and P.W.25 lay on another mat (M.O.18), which is important for the same reason. From the verandah one can enter the room marked "B" on the plan and from that central room one can pass to rooms north and south. Immediately to the north of that central room was a room in which was lying a child of P.W.26, the mother of the third deceased. Still north of that room again on a cot were lying the second and third deceased. To the south of the central room were lying P.W.26 and two of her children. To the west of this series of rooms which run north to south, is a verandah, from which is a passage way to the west leading into the dining hall and the kitchen. The western verandah of the main building was separated from this passage way by a door which was said to have been fastened on the night of the offence, as was the main entrance at the east. If those doors were secured, then, apparently, the house could only be entered by breaking open those doors. If one passed through the door separating the western verandah from the passage way, one passed first into the dining hall, where were sleeping the fourth deceased and his assistant, P.W.22. To the west of the main hall was a kitchen in which P.W.22 subsequently took refuge.

According to the story of the persons who were in that bungalow on the night of the offence and who survived the murderous assault, the first inkling that any strangers were trying to enter came from a banging on

the front door. P.W.24 deposed that the door had not been securely fastened. Although there were three bolts, only the bolt on the top had been secured; and so when the door was knocked that bolt fell and the door opend. P.W.24 does not give evidence of any great value; for as soon as he saw a person enter, he ran through into the middle room and there joined P.W.26 and her children. P.W.25, on hearing cries, hid behind an almirah situate close to where he was lying. From there he was able to see something of what was taking place. He deposed that a little after midnight (2 a. m. was that time generally agreed upon), he heard a sound of a battering of the front door Before he hid behind the almirah, the first deceased came saying 'Who is it, Eda' and then crying out "Boy, I am cheated", referring to the second deceased. He saw somebody cutting the first deceased with a weapon about a cubit long. He was able to see what was happening, not only by the moonlight shining through the door, but by the light of a torch which was being shown by the assailant. The second deceased then came running and flashed a torch to see what was happening. He ran back when he saw the assailant. The witness saw a person chasing the second deceased; but is unable to say whether or no that person was the same man who had attacked the first deceased. A little later, when things had become a little quieter, he made his escape. When the fourth deceased and P. W. 22 heard the door separating the verandah of the main building from the passage being broken open, P.W. 22 ran into the kitchen before anyone entered there; but he saw a person attacking the fourth deceased. Subsequently, somebody flashed a torch into the kitchen; but as he was hiding behind the door, he was not seen. The fourth deceased, though severely injured, was able to escape and give two statements, Exs. P-24 and P-7, before he died. Ex. P-24 is a statement recorded by a Head Constable. Later on, he was taken to the hospital, where the Sub Magistrate (P.W. 6) recorded the other statement, Ex. P-7. The earlier statement was a simple one in which he said that at about 2–30 a. m. he saw somebody flashing a torch and heard him kicking at the door of the bungalow. The man kicked open the door, flashed the torch in his face, and immediately began to attack him. It would seem from this statement that only one person came into the dining room where he was sleeping; but he saw a number of persons running away after attacking the second deceased. Then somebody fired at him with a gun and wounded him in the hip. Ex. P. 7 is to the same effect and is clear that he saw only one person, and that that man incited another to shoot him. It is of importance that in Ex. P. 7 he stated that the man whom he saw was a Moplah. P. W. 18 sleeping in a Ford Car in a shed that had been erected against the southern wall of the bungalow, and when some person ran there and set fire to the car, he escaped without identifying anybody. He said that he was able to make out from the accent of the assailants that they were Moplahs. There is other evidence that the persons who were attacking there were Moplahs; and we find no reason for thinking that the persons who made these statements were unable to say to what community the attackers belonged; for the dress and speech of the Moplahs are distinctive.

The offence was committed on the 3rd August 1947, and for a long time no clues were obtained. A person by the name of Haneefa was later arrested and identified by P. W. 25 as one of the assailants. On the day of his arrest (14–10–1947) was arrested also Kunhammad, a brother of the first and second deceased, who had been converted upon the persuasion of his brothers, but later reverted to Islam. Another person arrested at the same time was one Kutti Ali, the father-in-law of Kunhammad. In the meanwhile, the police had been examining the bungalow very closely and a number of blood-stained footmarks were found in the bungalow on the mats M. Os. 17 and 18 and in the portico. One of these impressions was thought at one time by the Foot Print Expert (P. W. 33) to be that of the right foot of Haneefa. Soon after these persons were arrestrd and one of the foot prints identified to be that of Haneefa, a charge sheet was filed against these four persons. 6 or 7 weeks later, on 2–12–1947, another charge sheet was filed, this time against 13 persons, including the four who had been charge-sheeted earlier, but not including any of the present accused or P. W. 10, the approver.

On the 14th October 1947, a special investigating officer (P. W. 45) had been sent to investigate, and he had come to the conclusion that the murder had been committed out of religious fanaticism; and since he had found some hair adhering to a door frame with broken glass in the room in which P.W. 26 was sleeping with two of her children, he sent out constables to make a diligent search in all the neighbourhood for persons who

had been injured. The first man with scars to be found was apparently the seventh accused, who was arrested on 14–12–1947. His arrest was followed on 17–12–1947 by the arrest of the sixth accused. The fifth accused was found with scars and arrested on 26–12–1947. On 28–12–1947, the second and fourth accused were arrested, the latter having scars. P. W. 10 had been arrested on 24–12–1947 and gave a statement implicating himself and others on 30–12–1947, whereupon the first and third accused were arrested almost immediately on 1–1–1948. Footprints of the arrested men were taken and examined and provisional charge-sheets filed; but it was not until 22–3–1948 that the final charge-sheet was filed against these seven accused, and these accused alone.

No special reason has been given by the prosecution why these seven accused and the approver, P. W. 10, should have participated in this murder. It has not been shown that these eight persons bore any greater enmity towards the first deceased than any other member of their community, except possibly the fourth accused, who is the President of the Izzathai Islam Sangham, the principal objects of which are said to be to relieve needy Mussalmans and to send converted men to Ponnani for training. He is a leather merchant; but all the other accused seem to be men of humble status, though of independent means, with the exception of the seventh accused, a coolie. Accused 1 to 3 are ryots. The fifth accused is a cart driver and the sixth accused a tea shop keeper. With the exception of the fourth accused, these men do not occupy any position either in society or in the religious life of the community that would make it likely that they would plot a murder of this kind.

The principle evidence against the accused is that of the approver, P. W. 10. One generally expects the evidence of an approver to be rich in detail and colour, consistent within itself and not having any important contradictions when compared with other statements made by him earlier. Such evidence carries conviction to the mind; so that a court feels that very little other evidence is necessary to satisfy it beyond all reasonable doubt that the approver's story is true. The evidence of the approver in this case is not however of that kind. It is thin and bare and does not carry with it an air of conviction. After stating that he and other numbers of the Moplah community felt hatred towards the first deceased, he described very briefly the conspiracy, which he said took place on a Saturday at about the 14th or 15th of the month of Ramzan, about a week or so before the plot was executed. The plot was hatched quite by chance. At Konapparamukku, a place where people gather together in their leisure time to have a chat, the witness chanced to meet accused 4 and 5, and later accused 6, and discussed with them the enormity of the first deceased's lapse into heresy. At the actual conspiracy were also present accused 1 and 2. Then, after giving a very short account of the conspiracy, he went on to describe the events of the day of the murder, and said that at about 4 p. m. on that day (Saturday) he went to Kavattuparamba and there met the sixth accused. They were joined some time later by accused 2 to 5 and 7. From there, with the exception of himself, these persons left in ones and twos, apparently agreeing to meet at Abu Baker Haji's rubber estate at 10 p. m. or so. The witness waited behind until 7–30 p. m. for the first accused, who had been observing the Ramzan fast and intended to set out only after he broke it. They then went to the place of assignation and assembled there at 10 p. m. They had with them some unlicensed guns and, as agreed amongst themselves, each one of them had a knife. They then proceeded to the Malaparamba bungalow of the first deceased and while the witness kept watch, the others went inside the compound over the southern wall. He then heard the sound of striking the door and human cries. About ten minutes later, all the seven accused returned. He fired a shot at somebody who was running away, presumably the fourth deceased. They then went on towards a tank about four miles away and there washed off the blood on their persons and either there or in the neighbouring jungle threw away their weapons and blood-stained clothes.

One thing that strikes one about this story apart from its bareness, is the open manner in which the accused and P. W. 10 met together on the day of offence prior to its commission. One would have expected that they would have adhered to their original plan of proceeding secretly to the place of assignation in Abu Bucker Haji's rubber estate and not being seen together before that. We find, however, according to the story of this witness, that they met together as early as 4 p. m. and openly waited for one another until all but the first accused had come. When one compares the evidence of P. W. 10 in the Sessions Court with his confessional statemen one finds material discrepancies relating to th

circumstances under which murder was planned. Ex. D-7 series are extracts from his statement made to the police. There he stated that they first planned the murder on a Monday about 2-1/2 weeks or so before the murder was committed. Then they, i. e. P. W. 10, and accused 2, 3, 5, and 6 decided to murder the first deceased on the following Sunday. On that Sunday they received information that the first deceased was not in his bungalow; and so it was postponed to the following Friday. They then arranged that himself and accused 1 to 3 and 6 should meet at 10 p. m. that night and that accused 4 and 5 should join them after they had left the tope on their way to Malappuram. They however found that it was again impossible to execute their plan that night; and so the murder was postponed until the following day, with the slightly different arrangement that they should meet together at the Kottapadi maidan at 5 p. m. This seems to us a very different story from what was given by P. W. 10 in his evidence. One cannot say upon reading through the evidence of P. W. 10 that it is necessarily false; but failing as it does to carry conviction, we feel that very substantial corroboration of his story would be necessary before it would be possible to bring home the guilt of this offence to the appellants beyond all reasonable doubt.

The learned Sessions Judge relied principally for the corroboration of P. W. 10's evidence on the evidence of P. W. 33, the foot-print expert. In paragraph 38 of his judgment, the learned judge stated :

> "So far as accused 1, 3 and 5 are concerned, their complicity is established, because their foot-prints were found at the scene. As regards the 4th accused, P. W. 16 proves that the 4th accused was on his way to the scene along with P. W. 10 and the 5th accused. This is sufficient corroboration for P. W. 13's evidence, as it is manifest that the 4th accused could not have had a destination different from his companions.'

That is to say, assuming the guilt of accused 1, 3 and 5 because their foot-prints were found in the bungalow, the fourth accused must have been guilty, too, because he was associated with men whose foot-prints had been proved to be that of the murderers.

The opinion of a foot-print expert is not admissible as evidence. If the court is to make any use at all of foot-print impressions, it must be satisfied from a comparison of the various foot-prints that they are those of the persons whom the expert says they are. The value of evidence with regard to foot-prints is obviously very much less trust-worthy than evidence with regard to finger-prints. In a fairly good impression of a finger or even in an impression where only a portion of the finger is shown, there is a wealth of detail available to the expert and to the court for comparison. One sees in a finger-print a large number of ridges and sweat pores situated along them. In examining a finger-print, therefore, one not merely compares the general configuration of the finger and all the lines on it, but one is able to study such minute details as the bifurcations and junctions of the ridges and the relative positions on those ridges of the sweat pores. With regard to foot prints, on the other hand, it would seem from the evidence and from what we have been able to read from Dr. Hans Gross's book on Criminal Investigation that one can only compare the general shape of foot-prints found with the shape of impressions taken from the feet of the person suspected. Even in this limited comparison, one has not the same certainty as one would have in comparing finger-prints; because foot impressions vary considerably according to the circumstances under which they are made. Foot prints made when a person is walking slowly or fast, or running slowly or fast or jumping, all create differences which are material. Moreover, a foot print taken after a person has walked a considerable distance, as was the case here when the murder was committed, is larger than a foot print taken when a person has been at rest, as was the case when foot prints were taken from the various persons in the Sub Jail, including some of the accused and P. W. 10. At page 497 of John Adam's translation of the above book, the learned author says :

> "One may then say with Massen, and rightly, that the details of all the impressions of a bare foot are in each particular case so distinctive and so characteristic that it is always possible to differentiate them, one from another, and recognise again the same impression. This is wholly true only when the impressions in question have been produced under idendical conditions.........
>
> If then the last and the first impression thus produced be compared, one will see how difficult it is to find this famous 'characteristic resemblance'."

He then goes on to say that the difficulty increases if the foot is turned or moved. At page 499 he points out the necessity for making a number of trials in order to ascertain

the circumstances under which an impression was made. He says that it is therefore necessary to find each time (when conducting the experiment of taking a number of impressions without adding any fresh colouring matter) a foot-print resembling the original in the quantity of colouring substance, when alone impressions from the same foot might be expected to be similar. At page 510, the learned author says :—

> "Another result flowing from these conclusions is that the deductions made are only relative; they can never be expressed by pre-cited data and have only comparative value. It is impossible to give measurements or fixed sizes; for the numerous factors—the size, the weight, and the other corporeal singularities of the individual walking, his burden, his gait, and the variable nature of the soil differ in every case, and may be combined in so many diverse ways that it is absolutely impossible to give precise indications on this matter."

After discussing the matter further the author says :

> "If one has but one indistinct foot-print and no clue therefrom, another must be searched for."

The only other passage that need be set out is found at page 532 :

> "Much prudence must here be exercised (in taking measurements) and nothing undertaken which shows no chance of success. On the one hand the foot itself varies considerably, e. g., it is much smaller in cold whether or after a long rest than during hot weather or after a long march; on the other hand it is difficult to measure, in as much as it is not a regular body and must be measured differently according to the parts dealt with."

If we bear all these facts in mind, then we are far from satisfied that the prosecution has proved that the foot impressions seen by the police on M. Os. 17 and 18 and on the portico are the foot impressions of accused 1, 3 and 5. The process adopted by the expert for comparison was first of all to lift the impression by placing over it a glass plate. Through that glass plate he would see the impression and make its outline on the glass with dots. He would then place the plate so marked over a plain sheet of paper and mark the dots on the paper. Finally he compared that with an impression made directly from the foot of the person suspected.

Ex. P. 41 is said to have been taken from M.O. 17, which is not a very good impression; and we do not think that the dots showing the outline of the toes follow very closely the outline on the mat. Then again we find in examining the angles of the toes on the tracing taken from the impression on the mat and comparing it with the impression taken directly from the feet of the fifth accused that the angles at which the toes meet the ball of the foot are different in the two cases. In discussing these impressions the foot-print expert stated that in general the size and contour of the pad was the same, as were the relative positions of the toes and the contour of the heel. That is true; but we cannot attach any importance to the inward curve in the lower portion of the pad, which is given as a special characteristic. That inward curve, however, was not very well emphasised in the print taken directly from the foot of the accused; and the inward carve might well be due to the fact that blood did not cover that particular portion of the pad.

The impression on M. O. 18 is also not very clear. The lifted impression in Ex. P-42, the expert stated, is in general of the same length as the impression in Ex. P-55, i. e. the impression of the foot of the third accused; the outer line of the pad is similar; and the relative positions of the big toe, second toe, and third toe are similar, as is the size of the big toe and of the heel. When we examined these, we found that the relative positions of the big toe, second toe, and third toe are anything but similar. In fact, they are so dissimilar as to lead us to conclude, not merely that the resemblance between the impression of the third accused's feet was not the same as the impression on the mat, but that the impressions must have been by different persons. We also did not find that the outlines and sizes of the heel and big toe and the length were very nearly the same in the two impressions compared.

With regard to the impression, Ex. P. 54, of the first accused, the expert gave six general characteristics and two special characteristics which he found common to Ex. P-54 and the impression, Ex. P. 35, lifted from the foot-print in the portico. The second special characteristic is that there is a depression on the pad between the first and second toe. This, as we have stated with regard to other peculiarities in the outline, may have been due to the fact that that portion of the feet was not sufficiently covered with blood to leave an impression, especially as the corresponding depression is not seen to anything like the same extent on the

impression taken directly from the first accused's foot. In trying to ascertain whether the foot-print in the portico was that of the first accused, we are handicapped by not having been able to compare the outline marked on the glass with the outline on the portico itself; and we feel that it will not be safe for us to come to any conclusion against this accused in the absence of the original impression.

The learned Sessions Judge, for demonstration purposes, had several impressions taken of the feet of two peons in the Court. These we compared with those taken from the mats and the portico; and we found a reasonably close agreement between Ex. C-4 and Ex. C-5, taken from a foot of one of the peons, and Ex. P. 35, which was attributed by the expert to the first accused. This is perhaps some indication that one must be careful not to draw too hasty a conclusion from such similarities as were pointed out by the expert. Incidentally, it may be mentioned that Mr. Jayarama Ayyar has emphasised the evidence that only one assailant was present in the portico; and so even if we assume that one of these three accused was present in the bunglow that night, the other two foot-prints could not have been those of the other two, and might have been the impressions of the first and second deceased, whose foot prints could not be taken. We do not want to overstress this point; because the observation of P. W. 25 might have been faulty, and he ran away before the assailants left the bungalow.

The learned Public Prosecutor, finding that the evidence with regard to the foot-prints is far from conclusive, has relied on the fact that accused 4, 5 and 7 were found, when examined by various doctors, to have had scars on their persons which could have been the result of injuries sustained on the night of the offence. If there is evidence that an assailant has received any injury on some particular part of his person and a corresponding injury is found on the body of the suspected person shortly after the offence is committed, and there is medical evidence that that injury was probably caused at or about the time when the offence was committed, the evidence of the injury would be strong corroborative evidence against that person. But such evidence becomes increasingly weak as the time between the examination of the injuries or the scars and the date of offence increases. These accused were examined five or six months or more after the offence was committed; and so it was impossible for the doctors who gave evidence to say precisely that these injuries were caused on the day when the murder was committed or even within a short period before or after. They could not even be sure to within a month or so of the offence when the injuries were caused. Further, there is no evidence that any of the assailants met with injuries at the time when the murder was committed, except that when the police officers were examining the bungalow they found some hair adhering to some broken glass. That would indicate that on the person of one of the assailants on a part of his body normally covered with hair, one could expect to find an injury. The learned Public Prosecutor has stated that since there was a lot of broken glass strewn about, some of the assailants might have cut their feet walking over it. That may be true; but it is a curious circumstance that while many scars were found on the bodies of these accused persons, none was found on the feet of any of the accused. The seventh accused had no less than nine scars on his person, the fifth accused had three scars and the fourth accused had one scar and a number of scratches. The learned Public Prosecutor has been unable to suggest how so many injuries could have been caused to these three persons on the night of the offence. We are therefore unable to attach any value to this evidence.

P. W. 41, a tailor, deposed that he made a shirt for the fifth accused about eight months before the offence. When the tank spoken to by P. W. 10 was searched, a number of pieces of cloth were found there; and P. W. 41 claimed to be able to indentify a piece of cloth about 15" long as a portion of a shirt that he had made for the fifth accused. We have examined that fragment; and we can scarcely believe it possible that P. W. 41 could identify it as a part of the shirt he had made so long before for the fifth accused.

P. W. 13, a keeper of tea shops at Kodoor and Chattuparamba, deposed that at about 8-30 p.m. on the night of offence he met a man whom he thought to be P. W. 10 and another. If it really was P. W. 10 that he saw, it would be in accord with the evidence of the approver; for he and the first accused might well have been where P.W.13 said he saw them at about that hour. But P.W.13 is unable to say with any certainty that it was P. W. 10; and so his evidence is of no value and the learned Sessions Judge very rightly did not place any reliance on it.

P. W. 12 deposed that he saw P.W. 10, whom he had known for a very long time, and the first accused, who was then a stranger but whom he afterwards identified as the first accused, together in Malappuram at 4-30 p.m., on the evening preceding the offence and again at 7 p.m. in a tea shop. This evidence is inconsistent with the evidence of P. W. 10 who deposed that the first accused did not arrive there until 7-30 p.m. and that it was for him that he had remained behind after the other accused had left for Abu Bucker Haji's tope. Moreover, if P. W. 12 had seen P. W. 10 at 4-30 p.m. one would have expected, if P.W.10's evidence be true, that he would have seen the other accused who were with P.W. 10 at that time.

The only other witness whose evidence needs discussion is P.W.16. In the absence of any definite conclusion to be drawn from the foot-prints, the learned Public Prosecutor relies very strongly on the evidence of this witness. He deposed that on the evening preceding the offence he was taking tea in a shop at Palaparamba and left it at about 8–30 p.m. He had not gone very far when he saw P.W. 10 coming along. Behind him in a group were five other persons whom he did not identify. Behind them again, at a distance of 12 yards, were the fourth and fifth accused, whom he had known from boyhood. The place at which he saw these persons was only about a quarter of a furlong from Abu Bucker Haji's plantation, which was the place of assignation. This evidence does not accord very well with the evidence of P.W. 12, who saw P.W.10 and the first accused together on the other side of the plantation at the same time; and it conflicts still more definitely with the evidence of the approver, who stated that at 4–30 p.m. all the accused, with the exception of the first accused left singly or in pairs, agreeing to meet in Abu Bucker Haji's plantation at 10 p.m. As he left with the first accused three hours later, he was unlikely to have been with these persons at 8-30 p.m. P.W. 16's evidence, if true, shows that they were leaving the plantation, persumably on their way to commit the murder. These differences in time between the evidence of P.W. 10 and the evidence of P.W.16 can hardly be due to a mere misjudging of the time. The object of the conspirators was to proceed to the place of assignation singly or in pairs and not to be seen together; and so it is not likely that P. W. 10 would have been mistaken into thinking that he left the plantation at 10 p.m. if in fact he left it at 8-30 p.m. Moreover, their attempt at secrecy would have been frustrated if they had left the plantation as early as 8-30 p.m. when they would have expected to meet people on the road, who would see them all together. Nor could P.W. 10 very well have been mistaken as to the time; for he had just finished taking a cup of tea in the neighbouring tea shop and would have had a very good idea of the time in relation to his meal time; and it is not likely that he would have thought that it was 8-30 p.m. if in fact it was 10 p.m. The learned Public Prosecutor has asked us to accept the evidence of P.W. 16 on this point in preference to that of P.W. 10, and he has argued that we should not reject the evidence of P. W. 16 merely because we think it unlikely that the accused would have been in the open at about that time. If however we accept the evidence of P.W. 16 as true, then it is most unlikely that at the time they were on their way to the scene of offence, which was only eight miles away, and which they did not reach until 2 a.m. the next morning. If he did see them, it would seem more probable they were bound on some peaceful errand or were going for shikar, as the fourth accused is reported to have stated to this witness.

It is seen from the above discussion that the evidence of the approver receives no corroboration of any importance from the evidence of any of the other witnesses and has therefore to be rejected, as not being sufficient to bring home the offences to the appellants.

It is unfortunate that such a a grave crime has not been detected; but the failure of the prosecution to prove the offence against the appellants was not due to any defect in the investigation, which seems to have been most carefully–and certainly very honestly–conducted. No attempt was made to make evidence, where none was naturally forthcoming; and if the police were unable to obtain more evidence it was because the Moplah community largely succeeded in maintaining secrecy. It was almost impossible without their co-operation for the police to obtain any more evidence relating to the crime.

The appeals are allowed and the convictions and sentences passed on the appellants set aside. They are ordered to be set at liberty.

N.T.R. — *Appeals allowed*

R. T. No. 122 of 1948
Cr. App. Nos. 667 of 1948, 27 of 1949 & 696 of 1948

February 21, 1949

SUBBA RAO & PANCHAPAKESA AYYAR, JJ.

PADMARAJA SHETTY, In re

Evidence Act (I of 1872*), Ss.* 30, 114 *Ill* (*b*) & 133—*Approver's evidence—Corroboration—Evidence of another approver—Confession of co accused.*

The evidence of one accomplice or the confession of a co-accused should not be accepted as corroboration of the evidence of an approver.

Trial referred by the court of session of the South Kanara Division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 30 of 1948 on 11—11—1948 and appeals against the sentences passed upon the accused in the said S. C. No. 30 of 1948.

M.K. Nambiar, M. Sekhara Menon, B. Punyakoti Chetty & M. Santosh, for accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT

[SUBBA RAO, J.]

Accused 1 to 9 are the appellants. Accused 1 to 3 were convicted by the Sessions Judge of South Kanara under S. 302 of the Indian Penal Code and under S. 302 read with S. 34 of the Code. The first accused was sentenced to death, and the other two accused to transporation for life. Accused 1, 2, 4 and 5 were convicted under S. 201 of the Code and sentenced to rigorous imprisonment for a term of three years each. Accused 3 and 6 to 9 were convicted of the same offence but sentenced to rigorous imprisonment for a term of two years each.

For a correct appreciation of the facts and the contentions of the parties the following genealogy may usefully be referred to:

Seshappa
- Padmavathi
  - Amirthavathi
  - Padmaraja
- Marudevi
- Nemiraja Shetty
  - Chandravathi = Ramanna Semitha (deceased)

The second accused is a brother of Ramanna Semitha. The third accused is the brother-in-law of the first accused. Accused 4 to 9 are connected with the first accused either as tenants of his or of some others under his control and influence.

The first accused belongs to a well-known Aliyasanthana Jain family in Gardadi called Padthire family. The family house is surrounded by forest tracts with a few other houses belonging mostly to the tenants. Naturally, the family wielded great influence in that locality. Nemiraja Shetty was the manager of the Aliyasanthana family till about 1941. In 1940 he set apart certain property for the maintenance of Chandravathi and her children. In 1941, for one reason or other, Nemiraja Shetty relinquished his management in favour of Padmaraja Shetty, the first accused. After he became the Manager, Padmaraja Shetty refused to abide by the arrangement entered into by Nemiraja Shetty with Chandravathi, with the result that Chandravathi and her husband had to come to the family house of Padthire for their maintenance. Padmaraja Shetty, the first accused, shifted to another house in the neighbourhood. As the first accused was not maintaining Chandravathi and his family properly, Ramanna Semitha in his turn was putting obstacles in the way of the first accused's management of the properties. Ramanna Semitha had also shifted his wife and child to a nearer village in Belthangadi for convenience of medical treatment and also for the education of his boy. As the first accused was not providing Chandravathi with the necessary funds, Ramanna Semitha removed a quantity of rice stocked in the family house and sold the same on 5—2—1948. This enraged the first accused. The first accused along with accused 2 to 8 came to the Padthire house at about 8 P.M. on a Saturday. After the first accused ascertained from his mother the fact that the rice was removed by Ramanna Semitha he directed his companions to take out to the verandah the remaining stock of the rice. In the meantime the deceased came to the front entrance of the inner courtyard of the house but as it was bolted from inside he called out for opening it. After some heated discussion and exchange of abuses, the prosecution case is, the accused came out of the house from the back door. Accused 1 and 3 shot at the deceased. Accused 1 and 2 beat the deceased with sticks, even after he had fallen down with gunshot injuries and later on accused 1 to 9 together cremated the body in a hurry. Exhibit P-30, the sketch of the scene of offence filed in the case, clearly gives the situation of the house and the topography.

It also indicates the places where the accused and the deceased abused each other and also the place where the deceased was shot at.

We shall first consider the evidence against the first accused. P. W. 8 is the approver. He is a tenant of the first accused and also officiates at the ceremonies of *Bhootastana* in the Padthire house. He gives in a detailed manner the circumstances under which the deceased met with his end. It is not necessary to refer to all the facts deposed by him, except the version given by him as regards what happened in the inner court-yard and also in the outer court-yard. He deposes that all the accused were in the inner court-yard, shown as '2' in Exhibit P-30. The first accused's mother and sister were inside the house. It was then about 8 P.M. Ramanna Semitha arrived at the front door but as it was bolted from inside he called out to open it. The first accused said "You have stayed in our house so long. Due to you there is no rice in the house for food." The deceased retorted saying that the accused had eaten away the income due to his child all these years. This developed into a violent quarrel. The first accused asked them all to come out. He took the gun from the hand of the third accused, and the third accused took the gun from the fourth accused, and they all went out through the door in the back side of the inner court-yard. Then accused 1 and 3 stood in front of the hay-rick. The first accused fired a shot on Ramanna Semitha after flashing a torch light he had with him. The third accused also fired a shot at the deceased immediately thereafter. Ramanna Semitha dropped down in a crouching posture. Accused 1 to 4 then began to beat him. When he fell down he cried out for his mother-in-law. As she came out they stopped the beating. The deceased rolled himself and found his way to the outer yard. P. W. 8 saw him bleeding from the wounds on his person. Accused 1 to 3 said it is to be burnt and later on the dead body was cremated.

This version of the approver is corroborated on material particulars by other disinterested evidence in the case. P. W. 10 is Padmavathi the mother of the first accused. She speaks to the exchange of abuses between her son and the deceased. She heard two gun-shots immediately they went. She also heard Ramanna Semitha crying out "Mother-in-law, I am being beaten and killed." She followed her sister Marudevi and found Ramanna Semitha in a sitting posture in the porch. A suggestion was made in the cross-examination that she was deposing against her own son at the instigation of her daughter who was not on good terms with the accused. She was even reminded by the cross-examining counsel that her son was being charged for murder and if convicted might be sentenced to death. In spite of the warning she stated "I am telling the truth, what happened to my knowledge, I am not ever deposing against any one. I cannot tell a lie." The learned Sessions Judge rightly relied upon this evidence. The first accused is her only son. with the knowledge of the consequences if this accused was convicted she deposed to all the facts within her knowledge in an honest and straightforward manner; and it is impossible to believe that the old woman of 70 years would have spoken to facts, false to her knowledge, just to please her daughter. On the other hand, her motherly love should have prompted her to exculpate her son as far as possible. We do not see any reason to reject her evidence. If accepted, it corroborates the evidence of the approver on four material particulars:

(1) The accused and the deceased abused each other;

(2) Immediately the accused went out she heard two shots in succession;

(3) The deceased crying out to his mother-in-law;

(4) She saw Ramanna Semitha in a sitting posture in the porch wrigging himself and slipping down the steps into the yard.

P. W. 11 is Marudevi, the mother-in-law of the deceased. She also saw the accused in the house on that night and also the third and fourth accused, each having a gun in their hands. She also stated that the first accused took the gun from the third accused before he left with the others. The third accused, after handing over the gun that he had originally with him, took from the fourth accused the gun that he had with him; and the first accused had a light similar to M. O. 3 in one hand. She heard two gun-shots in succession and the cry of Ramanna Semitha "I am beaten and killed, mother-in-law". She went out with a lantern and saw Ramanna Semitha in a sitting posture and his being beaten by accused 1 and 2 with cane sticks. She saw his head broken and blood all over his person and the intestines coming out. He slipped and fell rolling down the steps into the yard. A short while after that Ramanna got up and walked staggering to the wicket gate leading to the field but at the wicket gate he gain fell and rolled down into the drain below. It is said that this

witness is an interested witness. It is true that she is the mother-in-law of the deceased; but she is also the maternal aunt of the first accused. There is no particular reason alleged or proved for her giving evidence, foisting a false case on the accused. She also corroborates the approver on the following material particulars :

(1) The exchange of hot words between the accused and the deceased;

(2) accused 1 and 2 going out with guns in their hands:

(3) the hearing of gun-shots in succession;

(4) she heard the cry of Ramanna Semitha, "I am beaten and killed, mother-in-law".

(5) the first accused having a light similar to M. O. 3 in his hand;

(6) accused 1 and 2 beating the deceased with cane sticks;

(7) her seeing his head broken and blood all over his person.

The evidence does not stop there. Ex. P-13 is the confessional statement made by the fourth accused Nemu Poojari. He also speaks to the mutual abuses, the shooting by accused 1 and 3, the deceased falling down, and the first and second accused beating him with sticks. He also spoke to the two women coming out. The learned counsel pointed out a discrepancy in the statement. The relevant passage on which the learned counsel relied upon may be extracted :

> "Upon hearing that, Padmaraja, Anni Semitha, Babu Bunnu and I went to the outer yard through the back door. There Bunnu took up one gun from the hay-rick and gave it to Padmaraja. I took up the other gun and gave it to Babu Bunnu."

According to the evicence of the approver and P.W. 11, the guns were taken by accused 1 and 3 from the inner yard itself: whereas this statement reads as if the third accused took the guns from out of the hay-rick after they went out to the outer yard. No doubt, there is a discrepancy. It is in evidence that the guns were placed in the hay-rick. The statement also clearly implicates accused 1 and 3 as the persons who fired the guns. The fourth accused might have made a mistake in regard to the point of time when the guns were taken from the hay-rick. Further, there is evidence in this case of P. Ws. 5 and 17, before whom the first accused admitted that he had shot and killed the deceased. P. W. 5 is related to the first accused the first accused's wife being his niece. He had to pay a sum of Rs. 850 to his niece and therefore went to Ponjila that day. He slept in a *chavadi* that night. At midnight he saw Padmavathi and the other woman awake, and the first accused also was there. The 1st accused told him that there was a big quarrel between Ramanna Semitha and himself and that he shot him and the latter died. He told him that incident as he pressed for a receipt for the money paid by him to the accused's wife and he told him that he was in troubled mind on account of the said incident. It was suggested to him in the cross-examination that he was giving this false evidence to escape the liability to pay the debt. The suggestion is far-fetched and cannot be a sufficient reason for P.W. 5 foisting a case of murder on the accused. He gave the evidence in a straightforward manner and there is no reason to reject it. P. W. 17 is alleged to cure people for snake bites. The first accused sent for him on the morning of the next day and told him that he should say that the accused had been bitten by a snake. The learned Sessions Judge accepted his evidence and we also see no reason to disbelieve this evidence.

We are satisfied that the evidence of the approver is corroborated in material particulars implicating the accused.

At this stage it will be convenient to consider the argument advanced by the learned counsel in regard to the law of corroboration. The law on this point in India is practically the same as that in England. It is so well settled that it will be unnecessary to consider the various decisions cited before us. It is enough to extract the important principles laid down in the leading case *Rex* v. *Baskerville* (1):

(1) the uncorroborated evidence of an accomplice is admissible in law;

(2) it has long been the practice at common law for a judge to warn the Jury of the danger of convicting a person on the uncorroborated testimony of an accomplice or accomplices, but the Judge should point out to the Jury that it is within their legal province to convict upon such unconfirmed evidence;

(3) the rule of practice has become virtually equivalent to a rule of law;

(4) the confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary; for if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case;

1. [1916] 2 K. B. 658.

(5) corroboration must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice ;

(6) corroboration must be independent testimony which implicates him, that is, which confirms in some material particular not only the evidence of the crime having been committed but also of the prisoner committing it ;

(7) córroboration can be of real circumstantial evidence of his connection with the crime.

In India the same principles have been embodied in the statutory form. S. 133 of the Indian Evidence Act reads as follows :

> "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) of S. 114 of the Evidence Act reads as follows :

> "An accomplice is unworthy of credit, unless he is corroborated in material particulars."

S. 30 of the Evidence Act also may be noticed. It states

> "When more persons than one are being tried jointly for the same offence, and a confession made by one such person affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession."

In *Muthukumaraswami Pillai* v. *King Emperor* [2] a Bench of five judges of this Court had to construe the sections and the learned Judges held by a majority that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true. Benson J. expressed his opinion in the following terms:

> "In my opinion there is nothing in the illustration (b) to Section 114 which overrides, or renders nugatory, the plain and explicit declaration contained in S. 133, or which requires us to hold that the evidence of an accomplice must always, and in all circumstances, be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the Court to act on such evidence, even when the Court believes it to be perfectly true."

In dealing with s. 114, Wallis J. observed that the said section laid down only presumptions and the Court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised. The dissenting view was expressed by Abdur Rahim J. The learned Judge thought that it was well established law that, except in circumstances of any special nature, it was the duty of the Court to raise the presumption that accomplices' evidence is unworthy of credit as against the accused persons unless it was corroborated in material particulars. This judgment expressed the well known principle of the English Law that an accomplice's evidence is legal evidence, but it does not lay emphasis on the rule of practice which the later decisions noted. In *Venkataramanna* v. *Emperor* [3] Sundaram Chetty and Pakenham Walsh, JJ. held that the evidence of an accomplice must as a rule be considered untrustworthy and should be corroborated in material particulars by independent and untainted evidence. They relied upon the following passage from the judgment in *Rex* v. *Mohesh Biswas* [4].

> "The corroboration which is needed in order to make Soorat Ali's testimony against the prisoners trustworthy should be corroboration derived from evidence which is independent of accomplices which is not vitiated by the accomplice character of the witness......and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed and participated in the acts of commission."

The Madras High Court again considered the law on the subject in the well known *Tyagaraja Baghavathar's case* [5]. Though this judgment was reversed by the Judicial Committee on the scope of s. 411-A of the Code of Criminal Procedure, the observations of the learned Judges in regard to the scope of corroborative evidence are left untouched. At page 396, the learned Judges state the law as follows :

> "S. 133 of the Indian Evidence Act states

2. [1912] M.W.N. 549 : I.L.R. 35 Mad 397 F.B.
3. [1933] M.W.N. 1129 : Cr. 173
4. 19 suth. W.R. (crl.) 16
5. [1946] M.W.N. 49 : Cr. 9 : I.L.R. 1946 Mad. 389

that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Under the English common law the same rule applies, but both in England and in India, it has become a rule of practice, and, to use the language of the Privy Council in *Mahadev* v. *The King* [6] it is now virtually a rule of law, that corroboration is required. It is also an accepted rule that one accomplice cannot corroborate another; but S. 30 of the Indian Evidence Act says that when more persons than one are being tried jointly for the same offence, and a confession made by one affecting himself and some of the others is proved, the Court may "take into consideration" the confession as against the others as well as against the person who makes the confession. There is no corresponding provision in English law. In the recent case of *Rajagopal, In re* [7], a Full Bench of this Court had to consider the effect of this section and it accepted as correct the interpretation to be found in Woodroffe and Ameer Ali's Law of Evidence, Ninth Edition, at page 312."

It is clear from this passage that the law in India is the same as in England except to the extent that it is modified by S. 30 of the Indian Evidence Act. The Full Bench case reported in *Rajagopal In re* [7] does not lay down any novel proposition but only endorses the principles of law that have been accepted and followed in this Court. The learned Judges state that though legally the approver's evidence is admissible under the Evidence Act and if accepted is sufficient to support a conviction, it should not be accepted unless the case is a very exceptional one. On the other point the learned Judges held that the confession of a co-accused can be accepted as corroboration of the approver's evidence. This conclusion was arrived at on a consideration of S. 30 of the Indian Evidence Act and the passage summarized in Woodroffe and Ameer Ali's Law of Evidence, 9th Edition page 312. We do not think that the learned Judges meant to lay down that the confessional statement has a higher sanctity than the evidence of an accomplice. They should be understood to have only meant that in view of the statutory provision a court can legally use the confession to corroborate the approver's evidence; and in that particular case they have used and relied upon that confession to corroborate the approver's evidence on material particulars. It does not follow from that judgment that as a point of law, a confession of a co-accused must be accepted as corroborative evidence of the approver's evidence. It does affect the rule of practice that the courts should be loath to accept tainted evidence as corroboration of an approver's evidence. The confession of a co-accused cannot in our view afford better or more reliable evidence than that of an accomplice. If an accomplice's evidence is tainted evidence, the confession of a co-accused also is tainted evidence. S. 30 of the Indian Evidence Act does not compel a court to accept the confession of a co-accused as corroboration of the approver's evidence. It only empowers the court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession. Though an accomplie's evidence is legal evidence and is not excluded by any of the provisions of the Evidence Act it has been held that as a rule of practice such evidence should not be accepted as corroborative evidence. The same principle should apply even in the case of a confessional statement. The value of a co-accused's confession as corroborative evidence has been considered by the Lahore High Court in the decision reported in *Shrif* v. *Emperor* [8]. The learned Judges observed:

> "In the first place it has been held time after time that the evidence of one approver cannot be corroborated by that of another approver. There must be independent corroboration, and in the second place the confession of a co-accused, while it must be taken into consideration, is invariably considered to carry little weight and itself to require corroboration. It has occasionally been said of such evidence that it is weaker than the evidence of an approver. That being so, the evidence of an approver, corroborated by a confession of a co-accused must be considered to be inferior to the evidence of one approver corroborated by the evidence of another."

We respectfully agree with these observations. If this principle is accepted S. 30 of the Evidence Act does not become nugatory. There will be very many circumstances when the co-accused's confession could be and should be

6. [1936] M.W.N. 889 : Cr. 165 P.C.
7. [1943] M.W.N. 793; Cr. 181: I.L.R. 1944 Mad. 308 (F.B.)
8. [1944] A.I.R. Lahore 472

taken into consideration by a court in finding out the guilt of the accused. In *Emperor* v. *Laxman Jairam* [9] some of such circumstances have been narrated. The relevant passage may usefully be extracted:

> "But in my view the confession is not strictly evidence against a co-accused, and I am clearly of opinion that a conviction based solely on the confession of a co-accused would be bad in law. There are many occasions on which the court is undoubtedly assisted by taking into consideration the confession of a co-accused. There may be the direct evidence of a single witness which the court would be more ready to accept if supported by the confession of a co-accused. Or, in a case depending on circumstantial evidence, where the question to be decided is what is the proper inference to be drawn from all the circumstances proved, the confession of the co-accused is one of the circumstances which may help the court in drawing a correct inference."

The learned counsel for the accused contended that there was no corroborative evidence in this case implicating the first accused in the commission of the crime. He laid emphasis upon the fact that no independent witness deposed to the fact that the first accused shot at the deceased. He relied upon the possibility of some other accused taking the gun from the hand of the first accused and shooting at the deceased. If the argument of the learned advocate is to be accepted it would make the evidence of an approver unnecessary. The approver's evidence can be corroborated not only by direct evidence but also by circumstantial evidence. In this case if the evidence of P. W. 10 and P. W. 11 is believed we can reasonably infer that the first accused shot at the deceased. Further, there is the evidence of P. W. 5 who deposed that the first accused admitted before him that he shot the deceased and he later died. Even *Baskerville's case* [1] relied on by the learned counsel does not support him. In that case the evidence relied upon for corroboration is only circumstantial evidence, and even if accepted it was not such as to exclude all the possibilities of the accused being innocent of the offence with which he was charged. If the evidence in this case is believed, it proves that the accused shot at the deceased and beat him with sticks, along with the second accused. The deceased was seen with wounds on the head and the stomach by P. W. 11. P. W. 11 says his head was broken and there was blood all over his person. His intestines had come out.

As a result of the wounds he died and he was urgently cremated. On these facts, we have no hesitation in holding that the first accused is guilty of murder.

So far as the 3rd accused is concerned, in our view he cannot be convicted for murder unless there was a common intention between the first and the 3rd accused to commit murder. The Judicial Committee gave an authoritative decision on the interpretation of S. 34 of the Indian Penal Code in the decision reported in *Mahbub Shah* v. *Emperor* [10]. It is not necessary to consider that decision at length except to extract the principle which is found at page 375:

> "It is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

Later on, after pointing out the distinction between *common intention* and *same intention*, the Judicial Committee gave the important caution that the inference of common intention within the meaning of the term in S. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case." No doubt, this judgment was interpreted by Chandrasekhara Ayyar and Kuppuswami Ayyar JJ. in the decision reported in *In re. Nachimuthu Goundan* [11], as not to rule out the possibility of a common intention developing in the course of the events, though it might not have been present to start with. In this case the evidence points out that there was no intention to commit murder at all, till the first accused was enraged after the exchange of abusive words between him and the deceased. The evidence only discloses that the intention was to remove the grain still remaining in Padthire house. Indeed, the witnesses speak to the fact that the first accused asked accused 2 to 5 to take out to

9. [1936] 38 Bom.L.R. 1122

10. [1945] M.W.N. 373 : Cr. 69 P.C.
11. [1946] M.W.N. 550 (2) : Cr. 98 (2)

the verandah the remaining stock of rice, presumably for removing it to the Punjila house. It is no doubt true that the accused secured two guns, and it is obvious on the evidence that they were secured more as a precaution against any possible emergencies than to use them against any particular person. After the exchange of hot words between the accused and the deceased, the first accused took the gun from the third accused, went out and shot at the deceased. According to the evidence, the third accused took the gun from the hand of the fourth accused and followed him and shot at the deceased. Can it be said on the facts that they had a common intention to do so? For aught we know, the first accused did not even know that the third accused was following him with a gun in his hand. It is not suggested that the third accused handed over the gun to the first accused and persuaded him to shoot the deceased. The first accused of his own accord took away the gun from the hands of the third accused. As there was no pre-arranged plan and the circumstances disclose that the first accused rushed to the hay-rick to shoot at the deceased taking the gun from the hands of accused 3 on the spur of the moment and he had not even the knowledge of the third accused having a gun, it is impossible to hold that there was any common intention between the two accused to commit murder. On the evidence, it is not possible to convict the third accused for murder as it is not proved that the the bullet from his gun hit the deceased. He did not take part in the subsequent beating of the deceased. On the aforesaid facts, we are of the opinion that the accused is guilty only of an attempt to commit murder.

So far as the second accused in concerned, if there was no common intention to commit murder, the only remaining evidence against him is that he beat the deceased with a cane stick. He is a brother of the deceased. P. W. 8 says that he gave along with the other accused, three or four blows with a stick. P. W. 11 said that the second accused beat the deceased with a cane stick. On the evidence it is impossible to say that this accused had the intention to kill his brother. It cannot even be said that he had knowledge that the deceased had received a gun shot wound at the time when he used the gun. P. W. 11 said that the deceased's head was broken. In the circumstances, in our view, this accused can be convicted only under S. 325 of the Indian Penal Code for having caused grievous hurt to the deceased.

There remains the charge under s. 201 I. P. C. against all the accused for causing the evidence of the commission of the offence to disappear. P. W. 8, the approver, describes the part taken by accused 1 to 8. The fourth accused in his confessional statement implicates all these accused as having taken part in disposing of the dead body. P.Ws. 12, 13, 14 and 16 corroborate the evidence of the approver. P. Ws. 12 and 13 took part in preparing the firewood to burn the body. P. W. 14 prepared the pyre to cremate the deceased. P. W. 16 carried the body to the pyre. All these witnesses are admittedly accomplices who, if their evidence is true, are also liable to be convicted under s. 201 along with the other accused. The question, therefore, is whether this tainted evidence can be accepted to corroborate the evidence of the approver. The principle that the tainted evidence of an accomplice should not be accepted as corroborative evidence of the approver has been accepted and followed in innumerable cases. One of such decisions is that of the Judicial Committee reported in *Mahadeo* v. *The King* [6]. At page 891 their Lordships observe:

> "It is well settled that the evidence of an accessory which Sukraj plainly was on his own showing, must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it, and further that evidence of one accomplice is not available as corroboration of another: *The King* v. *Baskerville* [1]. This rule as to corroboration, as was pointed out in the case just cited, long a rule of practice, is now virtually a rule of law,.......".

Following this principle, we are not prepared to accept the evidence of the accomplices as corroboration of the approver's evidence. In the circumstances of the case, we are also not prepared to accept the confessional statement of the fourth accused as corroborating the approver's evidence. There is no other evidence against accused 2, 3 and 5 to 9. We therefore hold that the charge under s. 201 I. P. C. is not made out against accused 2, 3 and 5 to 9. We set aside the conviction of the said accused under s. 201 I. P. C. The same cannot be said of accused 1 and 4. There is enough circumstantial evidence in the case to bring home the guilt to accused 1. In regard to accused 4, his confessional statement Exhibit P-13 can certainly be relied upon to corroborate the approver's evidence. We therefore convict accused 1 and 4 under s. 201 I. P. C.

As regards the sentences, the facts already narrated disclose that there was no premeditation to commit murder. The deceased was shot by the first accused on the spur of the moment in view of the acrimonious exchange of words that passed between them. All the accused gathered for the purpose of removing away the grain and, unfortunately and unexpectedly, this incident took place. We, therefore, consider that the ends of justice would be met if the first accused is awarded the lesser penalty of law. The death sentence imposed on him is set aside and instead he is sentenced to transportation for life. We also sentence him under s. 201 I. P. C. to three years rigorous imprisonment, but the two sentences shall run concurrently.

The second accused was sentenced by the Sessions Judge to transportation for life. We set aside the conviction for murder and convict him under s. 325, Indian Penal Code, and sentence him to five years rigorous imprisonment. We convict the third accused under s. 307, Indian Penal Code, and sentence him to seven years rigorous imprisonment. We sentence accused 4 to two years rigorous imprisonment. The conviction and sentences on the accused 2, 3 and 5 to 9 under s. 201 I. P. C. are set aside. Accused 5 to 9 are acquitted.

N.T.R.

—

Cr. R. C. No. 783 of 1948

July 27, 1949

PANCHAPAKESA AYYAR, J.

VARADADESIKACHARIAR

v.

KING

Penal Code (XLV of 1860*) s.* 161*—Offence under—Prevention of Corruption Act (II of* 1947*), s.* 4*—Presumption under.*

The petitioner, a clerical supervisor in the workshop of the return stores department, received sums of money and gifts from employees therein to recommend to the superior officer their retention in service. It was contended on his behalf that he himself had no power to retain them and that he could not compel the officer to retain them and that the money and gifts were given as mariyadas *or honours, by persons benefited by his recommendations and not as illegal gratifications.*

Held *that the petitioner believed in his ability to influence the officer and he made his recommendation only in his capacity as a supervisor and there was an implied bargain for fulfilment of an illegal gratification transaction despite the use of the term* mariyada *and that the petitioner was guilty under S.* 161 *I.P.C.*

Petition under Ss. 435 and 439 Cr.P.C. 1898 praying the High Court to revise the judgment of the court of Session of Chingleput Division dated 19—7—1948 and passed in C. A. No. 39 of 1948 preferred against the judgment of the court of the Sub Divisional Magistrate of Trivellore in C. C. No. 177 of 1947

K. S. Jayarama Aiyar & C. K. Venkatanarasimham, for Petr.

Asst. Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER

This is a petition by one Varadadesikachari to set aside his convictions under s. 161 I.P.C. (in respect of two counts) by the Sub Divisional Magistrate, Trivallur, confirmed by the Sessions Judge of Chingleput on appeal. The facts are briefly these:

The petitioner Varadadesikachari, aged 42, was living in Royapuram and was working as a Clerical Supervisor, Control Office Return Stores Dept., Alamadhi on a daily wage of Rs. 4—8—0. The workshop of the Return Stores Depot, Alamadhi, was under the control of a European Officer by name Lt. C. J. Wince, who has been demobilised and has returned to England now. The petitioner used to put up papers, for orders, to Lt. Wince and was, in the eyes of illiterate coolies like P. Ws. 3 to 9, a man of great influence with that officer. Lt. Wince received an anonymous petition against the petitioner which finally started the enquiry against the petitioner. The sum and substance of the charges against the petitioner is that he, being a public servant, in or about August 1946 accepted Rs. 100 (besides fruits for Rs. 5) from one R. K. Parasuraman P. W. 5, as illegal gratification, as reward for exercising his official favours to P. W. 5 and twenty-one other tent-menders of Bangalore group, viz. for recommending to Lt. Wince their retention in their jobs at R. S. D. Alamadhi, despite a retrenchment discharge notice served on them, and that on 22—8—1946, he accepted a gold ring, M. O. 2, worth Rs. 35—7—6, from one Avadi Krishnan P. W. 8, as illegal gratification, as a reward for exercising his official favours to P. W. 8 and other tent-menders of the non-Bangalore group, namely for recommending to Lt. Wince their retention in their jobs at R. S. D., Alamadhi, despite a retrenchment discharge notice served on them; and that in the same

month he accepted Rs. 10 from one C. Gangadaram, P. W. 9, through P. W. 3, as illegal gratification, as a reward for exercising his official favours to P. W. 9, viz. the recommendation to Lt. Wince for his retention in his A Grade job at R. S. D., Alamadhi, in spite of a notice retrenching him from A Grade and subsequently entertaining him in the III Grade. Both the courts below have, after an elaborate discussion of the entire evidence, found that the petitioner received the Rs. 100 and the gold ring and was guilty regarding the charges of illegal gratification on the first two counts, though they gave him the benefit of the doubt regarding the third count, as there was no independent corroboration of the evidence of the bribe-giver, P. W. 9, who, of course, was an accomplice.

Mr. K. S. Jayarama Iyer, for the petitioner, did not seriously dispute the fact of the acceptance of the Rs. 100 and the gold ring by the petitioner from P. Ws. 3 to 5, and 7 and 8 respectively. That fact was proved beyond all possibility of dispute, by the evidence of P. Ws. 3 to 8 and the recovery of the ring from the petitioner. He only raised three contentions: The first was that the petitioner did not receive them as illegal gratification, or bribe but simply as '*mariyadas*', or honours rendered to him by the persons benefited by his recommendation, who gave them willingly, and even joyfully, out of gratitude for his recommending them. It is well-known that modern law attaches little weight to euphemistic term used, or to the free will of the bribe-giver. Thus, many illegal cesses imposed by, and given willingly to, a zamindar have been set aside even though they are clothed in gorgeous terms as "kanikka" or voluntary gift *nazars*, marriage presents, etc. Many a payment has been held to be illegal gratification, though it has been joyously given to the corrupt officer and is called a gift in gratitude, *mamool* or by other euphemistic terms. A bribe, as distinguished from an extortion, is always voluntary. The distinction between a bribe and extortion is roughly that between adultery and rape. The essence of the matter is the real nature of the payment, to be gathered from the circumstances and under the general presumption mentioned in s. 4 of Act II of 1947. S. 4 says that, where in any trial of offences punishable under s. 161, I.P.C. it is proved that an accused person has accepted or obtained for himself any gratification other than legal remuneration or any valuable thing from any person, it *shall be presumed unless the contrary is proved* that he accepted or obtained it as a motive or reward as is mentioned in s. 161 I. P. C. In this case, this petitioner did not prove anything to the contrary, and the evidence proved conclusively that the parties intended these gifts to be only "illegal gratifications", as defined in s. 161 I. P. C. The age-long custom of giving and taking such bribes will only be a reason for reducing the sentences. When the petitioner promised to recommend them, and when they gave the money and the ring, there was an implied bargain for, and fulfilment of an illegal gratification transaction, despite the euphemistic term "*mariyada*" used. I, therefore, find against the first contention.

The next was that the petitioner had merely recommended the tent-menders, the givers of the Rs. 100 and the gold ring, to Lt. Wince, and that he had himself no power to retain the persons who made the gifts or compel Lt. Wince to retain them, and so would not be liable under s. 161 I. P. C. Reliance was placed on a ruling of Jackson, J. in *Re. Venkiah* [1]. I have looked into that ruling. It will not apply strictly to the facts of this case. Further, it is a ruling of 1924, long before Act II of 1947 has raised the mandatory presumption referred to above. Reliance was also placed on a bench ruling in *Venkatarama Naidu* v. *Emperor* [2]. The facts in that case are also not strictly applicable to the facts here. That is also far earlier than Act II of 1947 which has been enacted raising a mandatory presumption in view of the alarming increase in bribery in the country during this horrible postwar epoch and the need to deal with such cases with a strong hand free from the cob-webs of technical defences regarding absence of strict proof of motive, and acceptance of the gifts as *mamool*, *mariyada*, and other euphemistic terms dating from Hindu and Moghul times. It is obvious that this petitioner was a panjandrum under Lt. Wince and believed to be able to influence him, and that he had made recommendations only in his capacity as a Supervisor entitled to make those recommendations and not as an independent third party, philanthropist or samaritan. Hence, he will be clearly liable under s. 161, I. P. C.

The last contention was that, considering the entire circumstances and especially the fact that these payments were willingly made and were not stipulated for before the recommendations were made, and that these are

1. [1924] M.W.N. 894
2. [1929] M.W.N. 695 : Cr. 143

the petitioner's first offences, and date from 1946, and that the petitioner has been dismissed from service, the sentences might be modified and a fine imposed instead. The learned Public Prosecutor has no objection to this. No doubt bribery ought to be put down with an iron hand, as the learned Sessions Judge has rightly remarked. But each offender has to be dealt with in the light of the facts in his case. After considering the entire circumstances, I modify the sentence of imprisonment and fine imposed on the petitioner, and, seeing that the man has been dismissed from service for these very offences, impose a fine of Rs. 250 or in default, rigorous imprisonment for two months, on both the counts together. Time for payment of the balance of fine till 3 P.M. on 14—8—1949.

N.T.R. —

Cr. R. C. No. 139 of 1949
Cr. R. P. No. 134 of 1949

July 15, 1949

PANCHAPAKESA AYYAR, J.

Kotamsath APPANNA
v.
Koppoju APPALARAJU

Penal Code (XLV of 1860*), s.* 406*—Taking goods for a purpose—Retaining towards debts —Offence.*

Where the accused took a jewel from a goldsmith for showing it to his wife and placing an order for a similar jewel, failed to return it and retained it towards some debts due from the goldsmith,

Held *that the accused is guilty under s.* 406, *Penal Code. Wherever a thing is utilised for a purpose not intended against an express agreement or an implied understanding there will be an offence under s.* 406, *Penal Code.*

Petition under Ss. 435 and 439, Cr. P. C., 1898 praying the High Court to revise the order of the Sub-Divisional Magistrate, Vizagapatam in C. A. 24 of 1948 (C. C. 417 of 1948 Stationary Sub-Magistrate, Srungavarapukota).

Y. Suryanarayana, for Petr.
E. Venkatesam, for Respt.
Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER.

I have perused the entire records and heard the learned Counsel for the petitioner and the learned Public Prosecutor *contra*. Two courts found the petitioner guilty under s. 406 I.P.C. in respect of a gold jewel taken by him from P. W. 1, a goldsmith, on 18-4-1948 for showing it to his wife and placing an order for a similar jewel if she approved of it, and failing to return it and retaining it with him towards some debts due to him by P. W. 1, and refusing to return it. He has been fined Rs. 150, and the entire fine is directed to be paid to P. W. 1 as compensation for the loss of the jewel.

The learned Counsel for the petitioner urged that the lower courts should have believed the evidence of the D. Ws. and held the jewel to be his and made from gold supplied by him I cannot agree. The lower courts were right in disbelieving these D. Ws.

The next contention urged was that the petitioner has simply retained the jewel as security for his debt and will not be liable under s. 406 I. P. C. in view of the rulings in *re Adinarayana Iyer* [1] and *Rex* v. *Krishnan* [2] especially as he has produced the jewel in this court, and it is intact, though he is not willing to return it. The facts here are different from the facts in *in re Adinarayana Iyer* [1]. There a man willingly left a box in the accused's house and was not allowed to take it away before he paid his dues. That is analogous to a hotel-keeper's or lodging-house-keeper's lien over the luggage of customers and lodgers. Here, the petitioner promised to return the jewel and broke his promise and retained it and claimed it to be his own. The ruling in *Rex* v. *Krishnan* [2] clearly says that wherever a thing is utilised for a purpose not intended against an express agreement or implied understanding there will be an offence under s. 406 I.P.C. The mere fact that the jewel is in tact with the petitioner is irrelevant. He has caused wrongful loss to P. W. 1 by dishonestly retaining it and claiming it to be his and by misappropriating it. So he was rightly convicted. Even now he is not willing to return the jewel to P. W. 1 in which case I might have let him off with a small fine. In the circumstances I confirm the sentence and order under s. 545 Cr.P.C. also and dismiss the petition.

N.T.R. — *Petition dismissed*

1. [1907] 17 M.L.J. 413
2. [1940] M.W.N. 1163 : Cr. 165

Cr. M. P. No. 1529 of 1949

October 10, 1949

SATYANARAYANA RAO & BASHEER AHMED SAYEED, JJ.

Kalyanam VEERABHADRAYYA

v.

THE KING

Maintenance of Public Order Act (Mad. Act I of 1947), S. 1 (4)—If ultra vires*–Effect of–Madras Maintenance of Public Order Removal of Doubts Ordinance (I of* 1949)*—If valid—Legislative power—Delegation—Validity.*

The power of extending the life of an Act is legislative power and cannot be delegated by the Legislature to the Provincial Government or to any outside body. S. 1 (4) *of Madras Act I of* 1947 *empowering Provincial Government to extend the continuance of the Act by notification is therefore not valid and the Act ceased to have operation on the* 11*th March* 1948.

(1949) 12 *F. L. J.* 225 *F.C.* & 53 *C.W.N.* 728, followed

Since there was no Act in force on the date of the amending Act XVII of 1948, *the amending Act also had no effect.*

There is nothing wrong in the Governor proroguing the Assembly and the Council with a view to enable himself to issue an Ordinance and Ordinance I of 1949 *is not invalid on that ground.*

Ordinance I of 1949 *purports to* declare *and* amend. *To remove doubts by a declaratory Act there should be in existence an Act, the doubts in which have to be removed. If the Act had already ceased to be in force, a declaratory Act would have no operation. An amending Act is not an independent Act but an Act passed with a view to effect an improvement or to more effectively carry out the purpose for which the original Act was passed. If the original Act which was a temporary Act terminated after lapse of time, the amending Act would be inoperative. Therefore it must be held that unless there is a re-enacting provision in the Ordinance which amounts to a new Act, the declaratory and amending provisions of the Ordinance are not valid.*

1949 *F.L.J.* 225 *at pages* 243 & 252, referred to.

In the light of these principles, S. 2, *S.* 3(*a*) *and S.* 4 *of the Ordinance are of no effect, as they do not purport to enact or revive a new law but only seek to amend or clear doubts in the old Act.*

But S. 3 (*b*) *is an enacting provision, though the opening words of the section state 'for the removal of doubts it is hereby declared' and it retrospectively validates action, proceeding, notifications and orders made under the Act. Hence s.* 3 (*b*) *of the Ordinance is valid and operative.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of *habeas corpus* for production of the petitioner herein before the High Court for being set at liberty.

N. S. Mani for Messrs. Row & Reddy, for Petr.

The Advocate General (K. Rajah Iyer,) instructed by *N. T. Raghunathan*, for the Public Prosecutor for Crown.

ORDER.

These are applications under s. 491, Cr.P.C. to issue directions in the nature of habeas corpus directing the release of the petitioners who were detained under the Madras Maintenance of Public Order Act, 1947, (Act I of 1947). As these petitions raised some common questions of law, we thought it convenient to hear and dispose of these questions before considering the merits of each application. The orders of detention under the Act in all the petitions except four, Cr. M. Ps. Nos. 1645 and 1651 of 1949, 1527 and 1611 of 1949 were passed after 12th March 1948, and according to the petitioners on the date on which the orders of detention in these cases were passed, the Madras Maintenance of Public Order Act, 1947 ceased to be in force and that therefore the orders of detention were without authority and were illegal.

The Maintenance of Public Order Act, 1947 (Madras Act I of 1947), hereinafter called "the Act" in the course of this judgment, received the assent of the Governor-General on the 11th March 1947 and was first published in the Fort St. George Gazette on the 12th March 1947. Under s. 1, sub-cl. (3) of the Act it came into force at once. Under sub-cl. (4) it remains in force for a period of one year; but under that sub-clause the Provincial Government is empowered from time to time by notification in the Fort St. George Gazette to extend the continuance of this Act for a further period or periods not exceeding one year in the aggregate if in their opinion it is expedient so to do. On the expiry of the Act the provisions of s. 8 of the Madras General Clauses Act are made applicable, as if the Act had then been repealed. Before the ex-

piry of the period of one year from the commencement of the Act the Provincial Government by a notification in the Fort St. George Gazette extended the duration of the Act for a further period of one year commencing from 12th March 1948. (Vide G. O. No. 446 (General) dated 27th February 1948 published in the Fort St. George Gazette of 2nd March 1948). This notification, it would be noticed, was issued before the expiry of the period of one year from the commencement of the Act. Sub-cl. (4) of s. 1 of the Act was amended by the Madras Maintenance of Public Order (Amendment) Act, 1948 (Act XVII of 1948) by substituting for the words "for a further period or periods not exceeding one year in the aggregate" the words "for a further period or periods not exceeding three years in the aggregate." This amending Act received the assent of the Governor-General on the 17th August 1948 which was first published in the Fort St. George Gazette Extraordinary on the 20th August 1948. The life of the Act was further extended by another notification for a period of one more year from 12th March 1949. (Vide G. O. Mis. No. 594 (Public General) dated 4th March 1949.) By reason of this further extension the Act continues in force if the notifications were valid, till 12th March 1950. The orders of detention now in question were made during the period commencing from 12th March 1948. In *Jatindra Nath Gupta* v. *Province of Bihar* [1] the Federal Court held that the power delegated to the Provincial Government to extend the duration of the Bihar Maintenance of Public Order Act, 1947 on a resolution passed by the Legislative Assembly and agreed to by the Bihar Legislative Council, with or without modifications, was invalid, and that the said Act ceased to have operation on the termination of the period of one year from the commencement of that Act. This decision was pronounced on the 28th May 1949. Following the decision of the Federal Court the Calcutta High Court declared in *K. K. Badal Bose* v. *Chief Secretary to Government, West Bengal* [2] that a similar power of extending the life of an Act by a resolution of the Provincial Legislature contained in the West Bengal Security Act, 1948, was invalid. This decision was pronounced on the 27th June 1949. After these two decisions the Government of Madras promulgated the Ordinance of the 11th day of August 1949, Madras Ordinance I of 1949, with a view to remove doubts regarding the validity of the continuance of the Madras Maintenance of Public Order Act, 1947 and also to amend the Act. The Legislature in the Province was in session until it was prorogued by the Governor on the 2nd August 1949. The Ordinance was promulgated on the 11th August 1949, as the Legislature in the province was not in session, and as the Governor of Madras was satisfied that immediate action was necessary for the purpose of removing doubts regarding the validity of the continuance of the Madras Maintenance of Public Order Act 1947 and for amending it. The Ordinance was promulgated after the instructions of the Governor-General were obtained in pursuance of the proviso to s. 88(1) of the Government of India Act, 1935. It was issued by the Governor in exercise of the powers conferred upon him by S. 88 (1) of the Constitution Act. The Ordinance consists of four sections. S. 1 contains the short title, and s. 2 declares that the Madras Mnintenance of Public Order Act, 1947 remained in force on and from 12th March 1948 and shall continue to remain in force so long as the Ordinance remains in operation. It also amends S. 1 of the Act by omitting sub-sec.(4). S. 3 validates the Madras Maintenance of Public Order (Amendment) Ordinance 1948 and the Madras Maintenance of Public Order (Amendment) Act, 1948, Act XVII of 1948, and provides that they shall not be questioned on the ground that the Acts amended thereby were not in force at the time when the amending Ordinance was promulgated or the amending Act was enacted. S. 3, sub-cl. (b) is intended to validate the action taken by the Provincial Government on and after 12th March 1948 in accordance with the provisions of the Act. It states:

> "No action or proceeding taken, no notification issued, no order made, and nothing done, by any authority in accordance with the provisions of the said Act at any time on or after the 12th day of March 1948 shall be questioned on the ground that the said Act was not in force at that time."

S. 4 of the Ordinance introduces a new section, S. 4-A in the Act. It is presumably intended to nullify the effect of certain decisions of this Court which have taken the view that if the grounds of detention are vague and indefinite, or if there was inordinate delay in communicating the grounds to the detenu as required by S. 3 (1) of the Act, the order of detention could not be justified. The new S. 4-A

1. [1949] 12 F.L.J. 225
2. [1949] 53 C.W.N. 728

inserted by the Ordinance is as follows :

"No order of detention made in respect of any person in pursuance of any of the foregoing provisions at any time, whether before, on or after, the 12th day of March 1948, shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency, or any delay, in any communication made to such person under this Act."

This short summary of the provisions of law which have to be considered in this judgment will enable one to appreciate the contentions urged on either side. On behalf of the petitioners the main contention urged was that in view of the decision of the Federal Court which construed the provisions of the Bihar Act and held that the delegation was improper, it followed on the same reasoning that the delegation contained in s. 1 (4) of the Madras Act was equally invalid, and that at the time when the detention orders in these cases were passed, there was no law in force authorising the authority concerned to make the orders of detention, which are now in question. The petitioners' learned counsel urged that Ordinance No. 1 of 1949 was promulgated by the Governor by fraudulent exercise of the power vested in him under the Constitution Act, as the Governor intentionally prorogued the Legislature of the Province while in session with a view to clothe himself with the power of issuing an Ordinance under s. 88 (1) of the Constitution Act. It is also invalid as no circumstances existed which justified immediate action and the issue of an Ordinance. As the Act itself ceased to be in force on 12th March 1948 the amendment sought to be effected by the Ordinance are of no legal effect, as there can be no amendment of an Act which did not exist. Nor is it possible to remove doubts in an Act which ceased to be in force. For this contention also reliance was placed on the decision of the Federal Court on behalf of the petitioners.

The learned Advocate-General who appeared for the Government argued that the decision of the Federal Court was distinguishable as the provisions of the two Acts were entirely different, that a bare power to extend the duration or life of an Act was not a legislative power and could validly be delegated, and that this question was not considered fully by the Federal Court, and even if there were observations in the judgment of the Federal Court, those observations were *obiter*. According to the learned Advocate-General, in any event the power under sub-sec. (4) of s. 1 of the Act of extending the life of the Act is in the nature of conditional legislation which could validly be enacted by the Legislature of the Province. As a last resort he relied on the Ordinance as validating the detentions. In a very illuminating and able argument the learned Advocate-General canvassed at length the limits of delegated legislation under written constitutions and also the sovereign power of the English Parliament to delegate legislative authority.

The primary question that requires careful consideration is therefore whether the Legislature of the Province is competent to authorise the Provincial Executive Government to extend the duration of the Act and to continue the Act by notification. Before dealing with this question, it would be appropriate at this stage to dispose of a question of secondary importance raised on behalf of the petitioners. The notification of 27th February 1948 published in the Fort St George Gazette of 2nd March 1948 extended the life of the Act from 12th March 1948. It was argued that the extension should have been from 11th March 1948, as the Act had expired by that time. The Maintenance of Public Order Act, 1947 received the assent of the Governor-General on the 11th March 1947, and the assent was published in the Fort St. George Gazette on 12th March 1947. The Act must, according to the petitioners be deemed to have come into effect on 11th March 1947 when it received the assent of the Governor-General (from which date the one year should be reckoned) and not on the 12th March 1947 when the assent was published in the Fort St. George Gazette. In support of this argument reference was made to a passage in Maxwell on Interpretation of Statutes, 9th Edition at page 409, where the learned author states :

"A statute takes effect from the first moment of the day on which it is passed, unless another day be expressly named, in which case it comes into operation immediately on the expiration of the previous day. By a fiction of law, the whole session was formerly supposed to be held on its first day and to last only that one day, and every Act, if no other day was expressly fixed for the beginning of its operation, took effect, by relation, from the first day of the session."

To the same effect is the opinion of Crawford on Statutory Construction at page 152, paragraph 106, where the learned author states :

"In the absence of a constitutional or a

general statutory provision, or a provision in the statute itself relating to the effective date, the statute will take effect from the day of its passage or enactment; that is, from the date the last act necessary to complete the legislative process is performed."

In *Tomlinson* v. *Bullock*, [3], it was held that where no time is specified in the Act from which it is to come into operation the date on which the Act receives the royal assent is the date on which it comes into operation and takes effect from the very commencement of the day on which the royal assent is given. Of course, the law does not recognise fractions of a day, and when once an assent is received, it comes into effect from the very commencement of the day. See *Chenchiah* v. *Commissioner of Police, Madras* [4].

The short answer to this argument is that the Act is governed by the Madras General Clauses Act, 1891 (Act I of 1891) which lays down in s. 5 the principles for determining the commencement of an Act. According to this section, if no time is mentioned or no provision is made for the commencement of an Act, the Act comes into force upon the first publication made by the Governor in Fort St. George Gazette of the assent to the Act by the Governor-General of India. That is, the date of the first publication is taken as the date of the commencement of the Act, if no date is fixed for the commencement. The date of the passing of the Act therefore is different from the date when the Act comes into force. If the date is mentioned in the Act itself, the Act begins to operate or comes into effect from such date; but if no day is mentioned, the date of commencement of the Act is the date on which the assent of the Governor-General is published in the official Gazette for the first time. The present Act (No. I of 1947) has not fixed any date or time for its commencement. Under sub-cl. (3) of s. 1 it comes into force at once. The assent of the Governor-General was received on the 11th March 1947; but the assent was published in the Fort St. George Gazette only on the 12th March 1947. In view of sec. 5 of the Madras General Clauses Act the latter date, i.e. 12th March 1947 should be taken as the date of the commencement of the Act. In this view, therefore, the notification of 27th February 1948 extending the Act for one year from 12th March 1948 leaves no interval when the Act was not in force.

We shall now deal with the main question whether it was competent to the Provincial Legislature to delegate to the Provincial Government the power to extend the life of the Act by notification. It may not be out of place at this stage to recapitulate and set out the gist of the decisions of the Judicial Committee which have considered the position of the Legislatures created under a written constitution, particularly the Indian Legislalure and the Colonial Legislatures. Such legislatures are created by Statutes, Orders in Council, or Letters Patent. The power to legislate and its limits are defined by the Constitution. They are in no sense agents of the British Parliament which created them and the principle of *delegata potestas non potest delegari* is inapplicable to them. Within the limits prescribed by the statute they have sovereign and plenary powers of legislation of the same nature as the British Parliament. The authority creating them also fixes the limits of the field of legislation within which they possess plenary powers. The area is no doubt restricted but within the area their powers are unrestricted. In *Empress* v. *Burah* [5] which is the leading case on the subject Lord Selbourne L. C. described the position at page 180 as follows :

> "......their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively the legislative powers were created, and, by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express

3. [1879] 4 Q.B.D. 230
4. [1947] M.W.N. 277 : Cr. 61
5. [1879] 4 Cal. 172

condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions".

In *Hodge* v. *The Queen* [6], Lord Fitzgerald dealing with the British North America Act said as follows:

"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect".

These two cases, said Sir Robert P. Collier in *Powell* v. *Apollo Candle Company* [7] "have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent................". The British Parliament stands in a superior position as its powers are not circumscribed or limited by any written constitution. Its sovereignty is absolute and it may enact any legislation of its choice.

The British Parliament has unrestricted power of delegation. It may enact conditional legislation or may entrust to subordinate bodies the power to make bylaws or regulations in pursuance of an Act of Parliament which lays down the limits of such subordinate legislation. It can itself create legislatures and endow them with capacity or the power to legislate, define the area and also prescribe the limits of that area. The position, however, of the Indian legislatures and of Colonial legislatures is entirely different. In the United States of America the power of delegation is further complicated by two principles, one the tripartite division of the powers of the Government into executive, legislative and judicial, and the implied restriction of the power of one department of the Government to delegate its functions to the other. It is a principle inherent in the American Constitutional system that unless expressly provided the legislature cannot exercise either executive or judicial powers and an executive in its turn cannot exercise either legislative or judicial powers, and the judiciary is equally prohibited from exercising either executive or legislative powers. This strict division of the powers under the American Constitution has resulted in the view that no delegation is possible; but the modern tendency seems to be not to adhere to the strict view, as it is not possible for a legislature to enact laws providing for all contingencies and laying down rule so as to cover all details regarding the enforcement of particular Acts. Crawford on Statutory Construction referring to this division of powers under the American Constitution observes at page 13 :—

"It is, therefore, apparent that the division of governmental power into the legislative, the executive, and the judicial is an abstract and general division and probably was never intended to be strictly adhered to in actual operation. Nor does it mean, from a practical standpoint, that they must remain completely separate and distinct with no connecting link. All three departments derive their authority from the same source, and although their powers differ, they represent the sovereignity in equal degree. They are co-ordinated departments of the government, and as such are politically connected. They are mutually dependent and could not exist without the assistance of each other, for one makes the laws, another executes them, and the other expounds them. Yet the functions and the powers are not blended, although sometimes the powers theoretically belonging to one

6. [1884] 9 App. cas. 117 (132)
7. [1885] 10 App. cas. 282

department are exercised by another either at the express direction of law or incidentally as a means of exercising the power properly within its own domain. Each department must perform the duties assigned to it, and should not exercise those powers properly belonging to either of the other departments. And the powers properly belonging to each department are to be determined by a consideration of the language and intent of the Constitution, together with history, the nature of powers, limitations, and purposes of governments."

The other principle underlying the American Constitution is that the powers of the Government are considered to have their source in the authority of the people of the United States, and that the legislature was the agent of the people and therefore under a disability to delegate power confided to it to another authority on the principle of *delegata potestas non potest delegari*. These two principles however have no application to either the Indian legislatures or the Colonial legislatures, as it has now been authoritatively settled by the Privy Council in the decisions already referred to that such legislatures are not delegates of the Parliament and have plenary powers of legislation within the appointed limits.

The power of delegation however is recognised, but the question is, what are the limits of such delegation? As the legislative power of a Government is vested in the legislature under the Constitution Act it is not open to the legislature to surrender or abdicate that power or delegate it to another authority whether it is the executive Government or some other body. But a legislature is authorised to delegate a power which is non-legislative in character. Sometimes the delegated power may be in the nature of conditional legislation authorising an authority such as the executive to determine the time of the commencement of an Act and the area of its application after determining, if necessary certain facts. It may also entrust the power of extending the Act to other matters not enumerated in the Act itself. In other cases, the legislature entrusts to the subordinate bodies the power of making by-laws and regulations so as to carry out into execution the Act in which the principles and the policy of the legislature have been laid down with precision. In other words, the legislature by the Act passed by it lays down general principles and the policy, leaving out details to be filled in by regulations or rules by the executive Government or some other authority. This form of legislation is described by some text-writers as subordinate legislation and is very often resorted to by legislatures. The reason is that the legislatures have no time or the aptitude to consider and enact rules relating to the various details having regard to the complex nature of the administration and social life. The difficulty however is to draw the line between a legislative power and a non-legislative power. So far as we are aware, no authority has attempted to draw the line of demarcation, and all that is done is to state a number of principles by which the legality of delegation by a legislature is to be determined. The application of these principles, it must be admitted, is not very easy. All that can be said is, as stated by Crawford on Statutory Construction at page 25,

> "As a general rule, it would seem to be *the nature of the power* rather than the *manner* in which it is exercised by the administrative officer, which determines whether the delegation is lawful".

Another principle which is very often quoted from an American decision is:

> "The true distinction therefore is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made".

Conditional legislation of the kind dealt with by the Privy Council in *Empress* v. *Burah* [5] is considered to fall within the latter category, and it has been uniformly held that such a kind of delegation is valid. The attempt on the part of the learned Advocate General is to bring the present case within the principle of the above decision, and the other cases which have applied that principle. In *Empress* v. *Burah* [5] the Privy Council had to deal with Act XXII of 1867 passed by the Indian legislature. The Act purported to remove Garo Hills from the jurisdiction of the ordinary civil and criminal courts and to vest the civil and criminal administration of justice in the said territory in officers to be appointed by the Lieutenant Governor of Bengal. The Lieutenant Governor of Bengal was authorised by notification in the Calcutta Gazette to determine the time when the Act should come into operation in respect of the Garo Hills. The 9th section of the Act empowered the Lieutenant Governor from time to time by notification in the Calcutta Gazette to

extend the provisions of the Act to the Jaintia Hills, the Naga Hills and portions of the Khasia Hills. This delegation of the power to the Lieutenant Governor to determine the time of the commencement of the Act and also to extend its operation to other areas was questioned in the case. The High Court was of opinion that the delegation was bad, as it was delegation of a legislative power which offended also against the principle that an agent could not delegate his powers. It was pointed out by the Privy Council that it was not open to the Governor-General in Council to create a new legislature and arm it with legislative authority not authorised by the Councils Act. Lord Selbourne, L. C. overruled the objection and upset the view of the High Court as it was not a legislative power that was delegated to the Lieutenant Governor. The Lord Chancellor observed at page 182:

> "Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is directly and immediately under and by virtue of this Act (No. XXII of 1869) itself. The proper legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and in many circumstances it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure......"

From this it follows that when a legislation is complete in the sense that the legislature had exercised its will and its judgment regarding all matters, such as the place, the person or the laws and the powers but merely entrusted to some other authority the power of determining the time of the commencement of Act and the place or places to which it should be applied. It is not delegation of a legislative power at all and really falls within the category of non-legislative powers, and therefore such delegation is permissible.

There are other instances of conditional legislation which have been upheld by the Privy Council and which have been brought to our notice by the learned Advocate-General. In *Russel* v. *The Queen* [8] the validity of the Canada Temperance Act, 1878 was questioned. The Parliament of Canada passed the Canada Temperance Act, 1878 with the object of promoting Temperance in the Dominion and introducing uniform legislation in all the provinces respecting the traffic in intoxicating liquors. The Act was divided into three parts and the second part contained the prohibitory enactments. A machinery was provided under the Act by which the second part of the Act could be brought into force in any country or city by the Governor-General in Council by a proclamation published in the Gazette declaring that the second part of the Act shall be in force and take effect in such country or city. This method of bringing into force the Act was questioned on the ground that it was delegation of a legislative power and therefore invalid. The answer to this objection given by the Privy Council is at page 335:

> "The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual and the power so to legislate cannot be denied to the Parliament of Canada,

8. [1882] 7 App. Cas. 329

when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of the *Queen* v. *Burah* [5], lately before this Board".

In *Hodge* v. *The Queen* [6] the power of a local legislature to entrust to a Board of Commissioners under the Liquor Licence Act of 1877 authority to enact regulations was upheld as they were intended to carry out the object of the Act into operation. In *Powell* v. *Apollo Candle Co.* [7] under s. 133 of the New South Wales Customs Regulation Act of 1879 the Governor was authorised to levy a duty on certain articles. This delegation was questioned as being illegal. Applying the principle of the earlier decisions already referred to, the section was held valid.

Recently the question came up for examination before the Federal Court and the Privy Council in *Benoari Lal Sarma's Case* which related to the Special Criminal Courts Ordinance 1942 (II of 1942). The decision of the High Court and the Federal Court is to be found in *Emperor* v. *Benoari Lal Sarma* [9] and of the Privy Council in *King Emperor* v. *Benoari Lal Sarma* [10]. Under the Ordinance three kinds of criminal courts were constituted, Special Judges Special Magistrates and Summary Courts. A special Judge could be authorised to try such offences or class of offences or such cases or class of cases as the Provincial Government or a servant of the Crown empowered by the Provincial Government in this behalf may by general or special order in writing, direct. A similar power was conferred upon the Provincial Government or the servant of the Crown empowered by the Provincial Government to decide and direct what offences should be tried by a Special Magistrate. Under s. 26 of the Ordinance appeals from orders from sentences of courts constituted under the Ordinance were taken away from the jurisdiction of the ordinary courts constituted under the Criminal Procedure Code, and the jurisdiction even of the High Court was barred to entertain either an appeal or revision. Apart from other questions which were raised regarding the validity of this Ordinance the one question which is relevant for the purpose of this discussion is whether the delegation of the power to determine the nature of the offence or classes of offences and cases or classes of cases by the Special Judge or Special Magistrate, to the Provincial Government or the servant of the Crown was valid. The High Court as well as the Federal Court took the view that as the delegation was too general, it was invalid. The Officiating Chief Justice, Varadachariar, in an exhaustive judgment examined the limits of the doctrine of delegation of powers by a legislature and considered the relevant decisions on the point. The argument on behalf of the Crown was that it was a conditional legislation and not a delegation of legislative power which might be justified by the decisions of the Judicial Committee in *Empress* v. *Burah* [5], *Hodge* v. *The Queen* [6] and *Powell* v. *Apollo Candle Co.* [7]. The test laid down in an American case that "the distinction between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution to be exercised under or in pursuance of the law" was accepted as correctly laying down the distinction. The legislature in conferring however authority or discretion upon a body regarding the execution of the law into effect, it was pointed out, should not make it too general almost amounting to issue of a blank cheque to the authority; but the legislature must lay down the main principles and the policy leaving details to be filled in by the subordinate agency. Applying this test, it was held by the Federal Court that the delegation of the Ordinance amounted to an abdication or surrender of the power of the legislature the ordinance making power of the Governor-General being co-extensive with the power of the legislature to enact laws. This view of the provisions of the Ordinance was not accepted by the Privy Council. The difference between the Privy Council and the Federal Court was not due to any difference regarding the principles applicable but the application of the principles themselves. This case illustrates the difficulty in applying accepted principles for determination of the validity of a delegation of a power by a legislature in a given case. The Federal Court thought that the delegation was bad, as the language of the provisions of the Ordinance and the authority conferred were very wide, while the Judicial Committee was of opinion that it was in the nature of conditional legislation. Viscount Simon L. C. who delivered the judgment of the Board in that

9. [1943] M. W. N. 380 : Cr. 76 : I. L. R. (1943) 2 Cal. 1, F. C.
10. [1945] M.W.N. 41 : Cr 1 : 72 I.A. 57 P.C.

case dealing with this question observed at page 66 *King Emperor* v. *Benoari Lal Sarma* (10):

"The second objection has attracted more support, but is, in their Lordships' opinion, equally unfounded. It is undoubtedly true that the Governor-General acting under s. 72 of Schedule IX must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his *legislative powers at all*. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian Legislature which, as already pointed out, in view of the proclamation under s. 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a special court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. *This is not delegated legislation at all*. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Khundkar, J. on this part of the case. The latter judge appositely quotes a passage from the judgment of the Privy Council in the well known decision in *Russel* v. *The Queen* (8)". (The italics are ours).

These decisions are sufficient in our opinion to illustrate the essence of conditional legislation, which is not delegated legislation nor delegation of a legislative power. It may not however be out of place to refer to one other decision of the High Court of Australia, *Barter* v. *Ah Way* (11) on which strong reliance was placed by the learned Advocate-General. Under the Customs Act of 1901 of Australia certain imports were prohibited by the Act and such prohibited imports were enumerated in s. 52 of the Act and by clause (g) of that section the Governor-General was empowered to prohibit the importation of other goods. In exercise of this power the Governor-General in Council of Australia issued a proclamation on 29-12-1905 prohibiting the importation of opium suitable for smoking. The objection taken was that the power to prohibit the importation of opium was a power that should be exercised by the legislature and could not be delegated to the Governor-General in Council. The delegation was upheld on the ground that it was not delegation of a legislative power but conditional legislation, and was within the powers conferred on the Parliament by the Constitution. In arriving at this conclusion the High Court relied upon the decision in *Empress* v. *Burah* (5) and the cases that followed it. The remarks of O'Connor, J. at pages 636, 637 and 638 of the report are of considerable assistance in distinguishing between delegation of a legislative power and conditional legislation. In the case of conditional legislation the whole of the law which operates is to be found in the statute itself except as in that particular case the naming of the article to which the provisions ought to be applied. "It is a fundamental principle of the Constitution", says the learned Judge at page 637, "that everything necessary to the exercise of a power is included in the grant of a power. Everything necessary to the effective exercise of a power of legislation must, therefore, be taken to be conferred by the Constitution with that power. How the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the *application of the law*. But it is not possible to provide specifically for all cases, and therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied. In the case of *Field* v. *Clark* (12), which was cited to us by Mr. Lamb in the course of his argument, there is a passage which has a direct bearing upon this aspect of the power of the legislature. In delivering the judgment of the Court, Mr. Justice Harlen said, quoting from another case, *Moers* v. *City of Reading* (13):

11. 8 C.L.R. 626

12 143 W.N. 649

13. 21 Pa.S.R. 188

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law. So in *Lacke's Appeal* (14). 'To assert that a law is less than a law, because it is made to depend upon a future event or act, is to rob the legislature of the power to act clearly for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know'. The proper distinction the Court said was this:—'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and must therefore, be a subject of inquiry and determination outside the halls of legislation."

This decision in our opinion, brings out clearly the distinction between delegation of a power to make a law and the delegation of a power to apply a law if certain circumstances exist. The question is whether the power conferred upon the Provincial Government to extend the duration of the Act by s. 1 (4) of the Madras Maintenance of Public Order Act, 1947 falls under the former category or the latter.

Acts may be classified with reference to their *duration* into *permanent* or *perpetual* Acts and *temporary* Acts. A perpetual Act is of unlimited duration and continues in force for ever unless repealed or altered while a temporary Act continues in force during a fixed period or until repealed or altered earlier. It is for the Legislature to determine whether an Act should be perpetual or only of temporary duration. The period of the life of an Act is therefore determined by the exercise of the legislative will and is a legislative power. It is not analogous to the power of applying a legislation which is already complete to particular areas or particular class of persons or goods or even of determining the time of its commencement or the amount of its operation. Conditional legislation, as the decisions already referred to show, is of the latter description. After the expiration of the period fixed for the operation of a temporary Act, the Act automatically comes to an end. There is no analogy between conditional legislation which authorises an outside authority to determine the commencement or termination of an Act and the power to determine the life of an Act itself. No doubt in the case of conditional legislation, untill the condition is determined or is fulfilled, the law may be in a state of suspended animation but still it is law but needs its application to be determined by an extraneous authority. The power of extending the life of an Act is really a power to bring the Act itself into existence for a further period and if not so brought would cease to be law. It is therefore difficult to accept the contention of the learned Advocate-General that a bare power to extend an Act is in the nature of conditional legislation and is valid. Of course the word 'extend' is capable of more than one meaning. If it is merely a question of extending the operation of the Act already complete and alive, to other persons or goods or even to other areas not already specified in the Act itself the argument of the learned Advocate-General on the authorities is perfectly sound. But if by 'extend' is meant to extend the life of the Act itself and to prolong its duration it is a different matter and cannot be treated on the same footing as conditional legislation. The legislature, it is that is charged with the duty of taking into consideration the circumstances existing at the time of enacting a law, whether the law should continue in operation only for a short duration or should be perpetual. At each time that the legislatute thinks it fit to continue the life of an Act it must exercise its mind taking into consideration the circumstances and the situation at the time in order to decide whether there is or is not justification for extending the provisions of the Act particularly so in a case where the liberty of a subject is concerned and the effect of the Act is to curtail that liberty without recourse to a judicial determination by ordinary tribunals of the question whether a proper case for depriving a subject of his liberty is made out or not. Such a power cannot be delegated. The power of extending the life of an Act, in our opinion, is clearly legislative power, and its delegation in the present case to the Provincial Government, namely, the executive, is not warranted by any of the principles known to constitutional law.

The question, in our opinion, is really concluded by the decision of the Federal

14. 72 Pa.S.R. 491

Court. We thought it fit to consider the question in the light of the authorities placed before us by the learned Advocate-General as he contended that the decision of the Federal Court was not directly in point and that in any event the observations in some of the judgments were mere *obiter*. We do not however read the judgment of the Federal Court in the manner contended by the learned Advocate-General. We think it is a direct decision on the point, and the majority of the Judges are clearly of opinion that even a bare power to extend the life of an Act with or without modification, is a legislative power which could not be delegated. The judgment of the Federal Court is *Jatindranath Gupta* v. *Province oj Bihar* (1). It relates to the Bihar Maintenance of Public Order Act, 1947. The detention orders in question were made in January and February 1949, and the detenus were residents of Chota Nagpur Division of the province of Bihar which is a partially excluded area governed by the provisions of s. 92 of the Constitution Act. Under the section the Governor has a two-fold power of legislation. Under clause (1) of the section an Act of the Dominion legislature or of the Provincial legislature will not apply to an excluded area or a partially excluded area, unless the Governor by public notification extends the application of the Act with such exceptions or modifications as he may think fit to make. This power of extending Acts already passed by the Dominion legislative or the Provincial legislature is admittedly a legislative power. It was so decided also in *Chaturam* v. *Commissioner of Income-tax, Bihar* (15). Under subclause (2), the Governor himself is empowered to make regulations for the peace and good government of any excluded area or of partially excluded areas in a province, and by such regulations he is authorised even to repeal or amend any Act of the Dominion legislature or of the Provincial legislature of any existing law applicable for the time being to the area in question, but subject to the condition that such regulations are forthwith submitted to the Governor-General and assented to by him before they become operative. This is undoubtedly a plenary power of legislation vested in the Governor of the Provinces. The Bihar legislature passed the Bihar Maintenance of Public Order Act, 1947 which came into force on 16—3—1947, and its operation was limited to one year from the date of its commencement by s. 1 (3) of the Act. There is a proviso to that section, viz:

"The provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification".

As the Act could not by its own force have operation in Chota Nagpur Division the Governor of Bihar issued a notification on 16-3-1947 in exercise of the power vested in him under s. 92 (1) of the Constitution Act directing that the Act should apply to Chota Nagpur Division. The life of the Act was extended on the 11th March 1948 for a further period of one year from 16-3-1948 by the Provincial Government acting under the power conferred upon it under the proviso, after obtaining the sanction of the Bihar Legislative Assembly by a resolution passed by it. The Governor did not issue a fresh notification after the life of the Act was extended directing the application of the extended Act to Chota Nagpur. On 7-3-1949 however the Governor of Bihar issued a notification under s. 92 (1) of the Constitution Act directing that the said Bihar Maintenance of Public Order Act shall apply and shall always be deemed to have applied to the Chota Nagpur Division. The Bihar legislature passed an amending Act, Act V of 1949, on 15-3-1949 by which for the words "for the period of one year from the date of its commencement" occurring in sub-sec. (3) of s. 1 of the Bihar Maintenance of Public Order Act, 1947, the words and figures "till 31-3-1950" were substituted. On 12-3-1949 a notification was published by the Governor acting under s. 92 (1) of the Government of India Act directing that the Bihar Act V of 1949 shall apply to the Chota Nagpur division. The appellants were arrested at a time when there was no notification applying the extended Act to Chota Nagpur Division, the previous notification having already expired. The detentions were questioned on the ground that the Provincial Government had no power to extend the life of the Act, and the delegation contained in the proviso to s 1 (3) of the Act was unauthorised. There was an alternative contention that in any event as there was no notification applying the extended Act to the Chota Nagpur Division, the detentions were illegal even on that ground. Fazl Ali, J. dissented from the opinion of the majority and upheld the orders of detention. Patanjali Sastri, J. based his decision on the

15. (1947) F.C.R. 116

narrower ground that in the absence of a further notification by the Governor there was no Act in force justifying the orders of detention. The Governor in the exercise of his legislative power under s. 92 (1), according to the learned Judge, had no power to delegate legislative power of extending the duration of the Act to the Provincial Government. The amending Act V of 1949 was of no avail to sustain the detention, as the original Act ceased to have any operation in Chota Nagpur at the time it was applied by notification of the Governor to that division. The other learned Judges, the Chief Justice of India, Mahajan and Mukherjee, JJ., considered the larger question and were unanimous in holding that the orders of detention were not justified.

It will be observed that under the proviso there in question, the power of continuing the Act was vested in the Provincial Government, and required a resolution of the Bihar Legislative Assembly and the Bihar Legislative Council. It also vested in the Provincial Government a power to modify the Act, if necessary, besides extending the period for one more year. The argument of the learned Advocate-General is that the three learned Judges were not considering the bare power of extending the duration of the Act but were considering that power coupled with a power to modify, and that therefore the decision is not authority on the question with which we are now concerned. We do not agree with this contention. No doubt in that case there was also a power to modify, but the judgments of the three learned Judges contain a clear expression of opinion that even a bare power to extend the life of an Act is also a legislative power, the delegation of which is not permissible, and that it is not in the nature of conditional legislation. The learned Chief Justice at page 230 of the Report deals with this contention. He observes:

"In my opinion, the contention of the appellants on this point is correct. The proviso contains the power to extend the Act for a period of one year, with modifications, if any. It is one power and not two severable powers. The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. *The power to extend the operation of the Act beyond the period mentioned in the Act prima facie is a legislative power. It is for the Legislature to state how long a particular legislation will be* in operation. That cannot be left to the discretion of some other body". (The italics are ours).

The sentence in italics contains clear expression of opinion that the power to extend the duration of an Act beyond one year is a legislative power. The learned Judge continues:

"The power to modify an Act of a legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined subject to any restriction, limitation or proviso (which is the same as an exception) only. It seems to me therefore that the power contained in the proviso is legislative. Even keeping apart the power to modify the Act, I am unable to construe the proviso worded, as it is, *as conditional legislation by the* Provincial Government. S. 1 (3) and the proviso read together cannot be properly interpreted to mean that the legislature of Bihar in the performance of its legislative functions had prescribed the life of the Act beyond one year. For its continued existence beyond the period of one year it had not exercised its volition or judgment but left the same to another authority, which was not the legislative authority of the province The proviso is framed in the affirmative form, stating that it shall be extended for a period of one year by the Provicial Government on a resolution passed by the two Chambers. I also think that on a true construction of the proviso this power of legislation to extend the life of the Act beyond the first year *is not left in the legislative body established by the Government of India Act for the Province, but in a different body.* For the extension of the Act beyond the first year, the consent of the Governor of the Province is not required under the proviso. While s. 69 of the Constitution Act makes the Governor an essentianl part of the Government of the Province in performing its legislative functions, the procedure laid down for the extension of the Act beyond the first year is also different from the procedure prescribed under s. 78, etc. of the Constitution Act. Applying the principles laid down by the Judicial Committee of the Privy Council in the *Queen* v. *Burah* (5) and *Russell* v. *The Queen* (8). I do not think the extension of the Act beyond the first year by the notifications can escape being classed as a delegated legislation. It is not and cannot be disputed that delegated legislation will be *ultra vires*."

To our mind in the passages underlined the learned Chief Justice in unequivocal terms lays down that a bare power of extension of the life of an Act is a legislative power and that it should not be entrusted to an outside body.

Patanjali Sastri, J. also considered that in his opinion the discretion vested by the proviso in the Provincial Government and the two Chambers of the Provincial legislature to prolong the duration of the Act for a further period of one year with such modification as they may have thought fit, is a legislative power, and not a matter of mere administrative discretion. No doubt the learned Judge considers the power of extending along with the power of modification, and therefore this may not be treated as authority for the view that a power of extending the duration without more is a legislative power. But in considering the power of the Governor to delegate in advance the power of extending the duration of the Act to the partially excluded areas he expresses the opinion at page 235 as "abdication of his function in that regard"

> "Such a shifting of the burden of his responsibility could not have been contemplated by s. 92 (1) of the Government of India Act. It follows that the application of the first proviso to s. 1, sub sec. (3) of the Act to Chota Nagpur by the notification No. 900, dated 10-3-1947, was unconstitutional and assuming, without deciding, that the enactment of the proviso by the Provincial legislature was *intra vires*, and the notification issued by the provincial government on 11-3-1948, under that proviso was effective to extend the duration of the Act for one more year, a fresh notification by the Governor was necessary to bring the extended Act into force in Chota Nagpur, and in the absence of such notification the arrest and detention of the appellants must be held to be unauthorised and illegal".

Of course this passage is not direct authority on the point now under consideration; but however it throws light on the question in so far as the learned Judge holds that the delegation even by the Governor of such a power, who had the right to exercise legislative power under s. 92 (1) of the Act is unconstitutional.

Mahajan, J. at page 239 pointed out the distinction between delegation of power to make the law and conditional legislation in the following passage:

> "Distinction between delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring discretion or authority as to its execution to be exercised under and in pursuance of the law is a true one and has to be made in all cases where such a question is raised. In cases of conditional legislation, on fulfilment of the condition the legislation becomes absolute. But in cases of delegated legislation, the delegate has to take a decision whether that legislation is to continue or has to be modified, amended or varied.
>
> "The proviso which has been assailed in this case, judged on the above test, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void. To my mind, it not only amounts to abdication of legislative authority by the Provincial legislature, it goes further and amounts to setting up a parallel legislature for enacting a modified Bihar Maintenance of Public Order Act and for enacting a provision in it that that Act has to be enacted for a further period of one year".

Later on, he observes:

> "Nothing is here being done in pursuance of any law. What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if so, what that-law will be, whether that is what was originally enacted or something different. The body appointed as a delegate for declaring whether a penal Act of this character shall have longer life than originally contemplated by the legislature and if so, with what modification, is a new kind of legislature than entrusted with the duty under the Government of India Act, 1935... I am further of the opinion that the power given to extend the life of the Act for another year in the context of the language of s. 1 (3) also amounts to an Act of legislation and does not fall under the rule laid down in *The Queen* v. *Burah* (5). The Act in a mandatory form stated that it shall be in force for one year only. That being so, the power given in the proviso to re-enact it for another year is legislative power and does not amount to conditional legislation In letter and in spirit this proviso gives the impression that the Bihar legislature for reasons best known to itself wanted to retain the power of saying that the law shall continue for another year with such modification as it thinks fit, but that it did not want to meet as a legislature with its

necessary safeguards but wanted to do so by a resolution. The legislature in doing so acted beyond the powers conferred on it by the Act of Parliament".

Mukerjee, J. after considering the decisions in *the Queen* v. *Burah* (5), *Russel* v. *Queen* (8) and *King Emperor* v. *Benoarilal* (10) expressed his opinion at page 250 as follows :

"In my opinion, the validity of the proviso to s. 1 (3) of the Bihar Maintenance of Public Order Act cannot be upheld on the ground of its being a piece of contingent legislation. It cannot also be supported on the ground that what it delegates is a mere non-legislative function. *The duration of a statute is a matter for determinatian by the legislature itself*. From the language of sub-s. (3) of s. 1 and that of the proviso, it is difficult to say that the Legislature fixed the duration of the Act at two years from the date of the commencement and left it to the Provincial Govenment to determine at the end of one year in consultation with the two Houses of the Bihar Legislature whether the Act should be in operation for one year more. If that was the real intention of the legislature, it might have been argued that it was a piece of conditional legislation only. That this was not the intention of the Legislature is, however, clear from the fact that the Provincial Government is authorised to decide at the end of the year not merely whether the Act should be continued for another year but whether the Act itself should be modified in any way or not."

It view of these clear expressions of opinion by the highest judicial tribunal of the land it is impossible to hold that the question raised in these applications regarding the validity of the power of extension conferred upon the executive of this Province by s. 1 (4) of the Act is not covered by the majority decision of the Federal Court, and that the provision in s. 1 (4) of the Act is valid.

After the decision of the Federal Court, the same question was considered by the Calcutta High Court in *Badal Bose* v. *Cheief Secretary to Government, West Bengal* (2), a case under the West Bengal Security Act, 1948. S. 1 (4) of the Bengal Act was in these terms :

"It shall, in the first instance, remain in force for a period of one year : provided that it a resolution in that behalf is, before the date on which under this sub-section it would otherwise have ceased to operate, passed by the Provincial legislature it shall continue in force for a further period of one year from such date".

Under this proviso there is no power of modification but only a power to extend the duration. Applying the decision of the Federal Court, Harries, C. J. and Mitter, J. held that the Provincial legislature had no authority to continue the Act by a resolution. This case is concerned with a bare power of extension and is on all fours with the case now before us. The decision of the learned Judges is based mostly on an interpretation of the judgment of the Federal Court, and for the reasons already stated we are also of opinion that the decision of the Federal Court covers the point and that it is binding on us. In the two cases there is at least a requirement that a resolution of the Provincial legislature was necessary before extending the life of the Act. Under the Madras Act, there is not even this safeguard. The provincial Government had no duty at all to astertain the opinion of the legislature, and not even such safeguard is provided under the Madras Act. We do not, by this, mean that the delegation would have been valid, if such provision were made. All that we intend to point out is that the delegation in the present case is more absolute than in the two cases, in the sense that there is no obligation on the part of the Provincial Government to obtain the wishes of the legislature on the advisability of extending the duration of the Act. Form this it follows that the Madras Maintenance of Public Order Act, 1947 ceased to have operation and died a natural death on 11-3-1948.

Relying upon the hypothetical case suggested by Mukherjee, J. in the passage already cited from the judgment of the Federal Court, the learned Advocate-General contended that upon a true interpretation of s. 1 (4) of the Act, the legislature fixed the duration of the Act at two years from its commencement, and gave discretion to the Provincial Government to determine at the end of one year whether the Act should continue in operation for one more year or not. If that was the intention of the legislature, it is argued that it is a piece of conditional legislation as stated by Mukherjee, J. at page 251. The language, in our opinion, of s. 1 (4) of the Act does not admit of any doubt that it was not originally intended to be in force for a period of two years. The sub-section expressly says that the Act shall remain in force for a period of one year and that the Provincial Government may extend the Act from time to time by notification for a further period or periods not exceeding one year. The discretion given to

the Provinciai Government is clearly to extend the operation of the Act by another year, after the first year had elapsed, and the intention is not to fix the period of duration as two years in the first instance. The expression "upon the expiry of this Act" occurring in the last part of the sub-section is emphasised as having reference to the period of two years; but this in our opinion is a far-fetched construction of the sub-section. The Act expires at the end of the one year, if it is not continued for a further period. It it is continued, of course, it expires at the end of two years.

Therefore there were two possible periods contemplated by the legislature when the Act might expire either at the end of the first year or, if extended, at the end of the second year. The expression 'expiry' therefore does not indicate expiry only at the end of a period of two years. The illustration suggested in the judgment of Mukherjee, J. has, therefore, no application and we cannot accept the argument of the learned Advocate-General on this point.

We may also refer to two decisions of the Allahabad High Court both of single Judges, which have taken the countrary view. One of the decisions, *Gaurinandan* v. *Rex* (16) was referred to in the judgment of the Federal Court; but as no definite opinion was expressed by the learned Judges on the correctness of that decision it was urged on behalf of the Government by the learned Advocate-General that that decison must be treated as laying down the law correctly. Another decision is *Hariharanand* v. *Superintendent, Central Jail* (17) which follows the earlier decision at page 414, We have given sufficient reasons in the course of this judgment to show that the view contained in these two judgments cannot be accepted.

It remains for us now to consider the validity of the Ordinance which was promulgated by the Governor on 11-8-1949, Madras Ordinance I of 1949. The power of the Governor to promulgate an Ordinance during the recess of a legislature is contained in s. 81 of the Government of India Act as adopted by the India (Provincial Constitution) Order, 1947, the relevant portions of which are as follows:

"If at any time when the legislature of a Province is not in sessions the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require;

Provided that the Governor shall not, without instructions from the Governor-General, promulgate any such Ordinance if an Act of the Provincial legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General, it had received assent of the Governor-General.

(2) An Ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial legislature assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Provincial legislature and shall cease to operate at the expiration of six weeks from the reassembly of the legislature, or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council".

The rest of the section is not relevant. The assent of the Governor-General has been obtained in pursuance of the proviso to s. 88 (1) of the Government of India Act as the preamble of the Ordinance shows. There is a declaration by the Governor in the preamble that the legislature of the Province was not in session and that he was also satisfied that immediate action was necessary for the purpose of removing doubts and amending the Act. The legislature is deemed to be in session till it is prorogued or dissolved. The Governor has the undoubted right to prorogue the legislature, and in this case it is common ground that it was prorogued on 2-8-1949. It must be admitted that at the time the Ordinance was promulgated by the Governor the legislature was not in session, and that condition is therefore satisfied.

On behalf of the petitioners an affidavit of one C. V. Rajagopalachari was filed in which reference is made to a report in the Hindu dated 4-8-1949 that His Excellency the Governor of Madras contemplates to issue an Ordinance with a view to remove certain defects in the Madras Maintenance of Public Order Act, and that as no Ordinance can be issued while the legislature is in session, the Madras Assembly and Council were prorogued with effect from 2nd August by a

16. (1948) A.I.R. ALL. 414
17. (1948) A.I.R. ALL. 435

notification; and the deponent of the affidavit expressed surprise that the Government should have considered proroguing the legislature only for the purpose of passing an Ordinance. Mr. Mani, learned advocate for the petitioners in the course of his arguments urged that the promulgation of the Ordinance by the Governor in exercise of the power under s. 88 of the Government of India Act is really a fraud on the power, as the legislature which was in session was purposely prorogued by the Governor with a view to confer upon himself the power of issuing an Ordinance. We think this is an unfounded suggestion for which there is no basis, assuming that fraudulent exercise of the power would vitiate the Ordinance. It is open to His Excellenccy the Governor to prorogue the legislature at any time he pleases. We do not see anything wrong in the Governor proroguing the Assembly and the Council with a view to enable himself to issue an Ordinance under s. 88. It is a well-known fact that the legislature, which is democratically constituted, is very slow to move in the matter of legislation, having regard to the rules of procedure laid down in that behalf, and if urgent action is necessary, at any rate, when His Excellency the Governor has reasons to believe that immediate action is necessary, it will be more expedient to have resort to the power of issuing an Ordinance under s. 88 rather than approach the legislature for the necessary legislation. The section itself requires that the Governor should be satisfied that circumstances exist which render it necessary for him to take immediate action. Of this necessity, the Governor is the sole judge. The satisfaction is that of the Governor. It is not open to a Court to canvass and find out whether in fact there could or could not have been the satisfaction. The power of the Governor under this section is analogous to the power of the Governor-General to promulgate Ordinances in case of emergency. It has been repeatedly held both by the Privy Council and High Courts that the Governor-General is the sole judge for deciding the existence of emergency which justified the issue of an Ordinance. See *Benoari Lal Sarma's case* (10) and *Jnan Prasanna* v. *Province of West Bengal* (18). It cannot but be admitted that the situation created at or about the time the Ordinance was promulgated was that in view of the two decisions, one of the Federal Court and the other of the Calcutta High Court, the Government must have felt that the validity of the continuance of the Ordinance by notifications was seriously in doubt, and it was possible that the orders of detention against several persons made under the Act were imperilled. The Governor must have thought that these persons, if set at libetty, might endanger public safety and might make it difficult for Government to maintain public order, as they were all persons who were found to be either acting or about to act in a manner prejudicial to the public safety or the maintenance of public order. In order to avoid such a situation it must have been felt that it was imperative that some step should be taken, and the result was the Ordinance, which was issued on 11-8-1949. It cannot be said that in such circumstances His Excellency the Governor was not justified in exercising his power under s. 88 (1) by issuing the Ordinance.

Mr. Mani, the learned advocate for the petitioners, laid emphasis on the preamble and urged that the word "expedient" did not occur in the section, and the Governor could not seek justification to amend the Act by relying upon expediency. In the subsequent paragraph in the preamble the Ordinance expressly states that the Governor of Madras was satisfied that immediate action was necessary for the purpose of removing doubts and amending the Act. If the condition as to necessity is satisfied, the powers to issue the Ordinance follows. The amendment sought to be effected was not introduced merely because it was expedient though it was given as an additional reason in the preamble; but the basis of the Ordinance is existence of necessity for immediate action in the manner indicated in the Ordinance.

The Ordinance introduced three important sections, Ss. 2 to 4. It may be now taken as settled law that the Governor's power of making law by Ordinance is analogous and is co-extensive with the power of the legislature to enact laws subject to two qualifications. One is that the power springs, into existence when the legislature is not in session, and when there is necessity to take immediate action. Secondly, the Ordinance ceases to operate at the expiration of six weeks from the re assembly of the legislature, if a resolution disapproving it is not passed by the Legislative Assembly and agreed to by the Legislative Council earlier. Subject to this, the Governor, under the power to issue Ordinances conferred upon him, is entitled to enact, alter or repeal laws and can even pass retrospective

18. (1949) A.I.R. CAL. 1

legislation. To what extent under the Ordinancemaking power the Governor can pass retroactive legislation is a point on which there is some doubt or difficulty. The Ordinance purports to *declare* and *amend*. The declaration is of course with a view to remove doubts. By S. 2 it is declared that the Madras Maintenance of Public Order Act, 1947 hereinafter referred to as the said Act remained in force on and from 12–3–1948 and shall continue to remain in force so long as this Ordinance remains in operation and with a view to achieve this object the last part of the section purports to omit S. 1, sub-sec. (4). If it merely declared that the Act continued in force the result would have been, the Act as originally stood, which is to remain in force for a period of one year from its commencement, would have continued in force for a period of one year from 12–3–1947. The mere declaration therefore would not have been sufficient to achieve the object of converting a temporary Act into an Act of unlimited duration. It was therefore necessary to amend the Act by omitting sub-sec. (4) of S. 1 altogether.

A declaratory Act as pointed out by Craies on Statute Law at page 60 is defined as "an Act passed to remove doubts existing as to the common law, or the meaning or effect of any Statute. Such Acts are usually held to be retrospective". An amending Act is not an independent Act but an Act passed with a view to effect an improvement or to more effectively carry out the purpose for which the original law was passed. To remove doubts by a declaratory Act, there should be in existence an Act, the doubts in which have to be removed. If the Act had already ceased to be in force, a declaratory Act would have no operation. An amending Act also presumes the existence of an original Act. If the original Act, which was a temporary Act, terminated after the lapse of time, the amending Act would be inoperative. It has been decided by the Federal Court in the same judgment dealing with the Bihar Maintenance of Public Order Act that the amending Act V of 1949 of the Bihar legisture was of no effect, as the main Act was not in operation in the Province at the time the amending Act was passed. The Chief Justice of India at page 231 of the Report considered a similar argument and observed :

> "Bihar Act V of 1949 is an amending Act. It is not a new Act. It purports only to amend the Bihar Maintenance of Public Order Act, 1947. That Act, which was a temporary Act, as its duration was fixed for one year by the Act itself, came to an end when the first year expired. The result is that when the Bihar Amending Act V of 1949 was passed, there was no Bihar Maintenance of Public Order Act, 1947 in operation in the Province which could be amended and the notification of the 18th March 1949 issued in the name of the Governor, could not improve the position."

With this opinion the majority of the learned Judges concurred. The amending provisions therefore of the present Ordinance are of no effect in view of our conclusion that the main Act came to an end when the first year expired. From this point of view, it must be held that unless there is a re-enacting provision in the Ordinance which amounts to a new Act, the declaratory and amending provisions of the Act are not valid. As pointed out in the judgments of the Federal Court particularly of Mahajan, J. at page 243 :

> "Unless the Act was revived, no amendment made in it could be of any effect. The only apt manner of reviving the expired Act was by *enacting a fresh statute* or by enacting a statute expressly saying that that Act is herewith revived."

The same opinion was expressed by Mukherjee, J. at page 252 where he states that :

> "It is certainly competent to the legislature in exercise of its plenary powers to *revive or re-enact* a legislation which has already expired by lapse of time. The legislature is also competent to legislate with retrospective effect ; but neither of these things seems to have been done in the present case. The legislature proceeds on the footing that the old Act was alive at the date when the new Act was passed, and the new Act merely purports to amend one of the provisions of the old Act. There could be no amendment of an enactment which is not in existence and from the fact that the legislature purports to amend an Act, it could not be held as a matter of construction that the intention of the legislature was to renew a dead Act or make a new enactment on the same terms as the old with retrospective effect."

In the light of these principles it follows that S. 2, S. 3 (a) and S. 4 which purports to insert a new S. 4-A of the Ordinance are of no effect,

as they do not purport to enact or revive a new law but only seek to amend or clear doubts in the old Act.

We felt considerable doubt whether the same reasoning would apply to S. 3 (b) which states:

> "No action or proceeding taken, no notification issued, no order made and nothing done, by any authority in accordance with the provisions of the said Act at any time on or after 12—3—1948 shall be questioned on the ground that the said Act was not in force at that time."

This in our opinion, is an enacting provision though the opening words of the section state, "for the removal of doubts it is hereby declared" and it retrospectively validates action, proceedings, notifications and orders made under the Act.

On a *prima facie* reading of the clause we at one stage thought that this might apply only to validate the further steps that were taken after 12—3—1948 in respect of orders of detention passed under the original Act before that date. Under the provisions of the Act it will be noticed that there are various steps which have to be taken by the Government before a final order under S. 3 (5) of the Act is passed. The grounds have to be communicated to the detenu. The matter thereafter should be referred to the Advisory Council which has to send its report to the Provincial Government, and the Provincial Government have to consider the report and pass appropriate orders under S. 3 (5). We have come across cases where orders of detention passed even within the period of one year from the date of the commencement of the Act were not confirmed even though more than one year had elapsed from the date of the order. If the original order of detention was validly made, but the confirmation was delayed for reasons beyond the control of the Government we thought that such proceedings taken after the expiry of the Act were intended to be validated by this provision. On a further consideration, however, we are of opinion that there is no reason for putting such a restricted construction upon this clause. No doubt the words 'the said Act' would refer only to the original Act, and the expression "purporting to act under the provisions of the said Act" is not used, which are words generally employed in provisions intended to validate irregular or illegal proceedings. But apparently it was assumed that as there was extension of the Act by notification, orders passed even after the lapse of one year from the date of the Act are orders passed in accordance with the provisions of the said Act, because there is no other Act except the original Act of 1947. Further, it closely refers to acts, proceedings, notifications, orders initiated, issued or made at any time on or after 12-3-1948, which is the date on which the Act came to an end, from which it is clear that it is the intention of His Excellency the Governor by this provision to validate all the proceedings. Such power of validation is recognized by courts in India and the Privy Council.

Immediately after the Special Criminal Courts Ordinance No. II of 1942 was declared *ultra vires* by the Federal Court the Governor-General issued Special Courts (Repeal) Ordinance No. XIX of 1943 by S. 3 provided that:

> "Any sentence passed by a Special Judge, a Special Magistrate or a summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect as if the trial at which it was passed had been held in accordance with the Cr. P. C., 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge, or a Magistrate of the First Class respectively, exercising competent jurisdiction under the said Code."

The validity of this provision was again questioned, and the Calcutta High Court held that it was invalid; but that decision was reversed by the Privy Council in *Kumar Singh Chhajor* v. *King Emperor* [19]. One of the objections raised was that the Ordinance was intended to set at naught the decision of the Federal Court. The Judicial Committee adverting to this contention observed:

> "It would require clear language to establish that any legislative authority intended to provide that convictions held to have been illegal by the highest judicial tribunal in the country should, nevertheless, be treated as legal legislative enactment. Their Lordships can find nothing in the language of s. 3, sub-sec. 1 of the Ordinance of 1943 to suggest that the Governor-General intended to do more than to render valid the punishment imposed by the special courts, leaving the validity of the convictions to rest on judicial decisions."

19. [1946] M.W.N 622: Cr. 109: 73 I.A. 199, P.C.

and the provision in the Ordinance was upheld. In view of this decision of the highest tribunal it is not necessary to refer to other decisions. The decision in *Jnan Prosanna* v. *Province of West Bengal* [18] recognized that it was competent to pass retrospective legislation by an Ordinance. We accordingly hold that s. 3 (b) of the Ordinance is valid and operative.

The petitions have now to be heard and disposed of in the light of the observations contained in this judgment, and they will be posted accordingly.

N.T.R. —

Cr.M.P. Nos. 481 to 487 & 489 to 492 of 1949.

April 20, 1949.

SATYANARAYANA RAO & VISWANATHA SASTRI, JJ.

K. RAJAGOPALA RAO & others.
v.
THE KING.

Maintenance of Public Order Act (Mad Act I of 1947), s. 2 (1)—Detention order—Interval between activity and order of detention—Order before release on bail—Bona fide—Jurisdiction of District Magistrate—Person in judicial custody of Subordinate Magistrate.

No definite period can be fixed so as to restrict the activity of the person which would be open for consideration by the detaining authority to pass an order of detention under s. 2 (1), Maintenance of Public Order Act; that must vary according to the circumstances of each case. Merely because there is an interval of more than two months between the date of the order of detention and the date on which the offences were committed it cannot be held that the period is unreasonable so as to make the activity remote so as to preclude the district magistrate from taking it into consideration.

Where immediately after an order of release on bail is made, the detaining authority proceeded to pass an order of detention under s. 2 (1) with a view to prevent the person concerned from regaining his liberty, the action of the detaining authority cannot be justified and must be presumed to be malafide; but where the order of detention is passed long before the release of the petitioner on bail and in the interests of public peace given effect to later, the district magistrate is not actuated by the motive of circumventing the effect of the order of the court directing the release on bail and there is no malafides.

The person whose activity is the basis for the order of detention and whose action is sought to be prevented under the section must be within the jurisdiction of the district magistrate proposing to take action under S. 2(1) of the Act.

The district magistrate has authority to take action against a person in the judicial custody of a magistrate of his district, though confined outside the district for security reasons.

Petitions under Section 491 of the Cr. P. C. praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue directions in the nature of Habeas Corpus for the production of the petitioners above named who are at present confined in camp jail, Cuddalore and direct them to be set at liberty.

N. S. Mani for Messrs. Row and Reddy, for Petrs.

N. T. Raghunathan for the Public Prosecutor, for Crown.

ORDER

(SATYANARYANA RAO, J.)

These eleven applications raise common questions for consideration and also are based on facts which are common.

On the 30th of January 1948, there was a rally of the members of the Rashtria Swayam Sevak Sangh at Vijayawada on which day Mahatma Gandhi died. On the next day, the 31st January, according to the grounds served on the detenus in these petitions, the petitioners and others conspired to attack the members of the Rashtria Swayam Sevak Sangh and in the various incidents that occurred that day, some members of that body were injured and a worker of the municipality was also killed. Some of the petitioners were arrested on the same day while others were arrested by the police on subsequent dates. A case was registered against 71 accused including the petitioners under various sections of the Indian Penal Code, which was later numbered as P.R. C. No. 1 of 1948 on the file of the Stationary Sub-Magistrate of Vijayawada. The petitioners and the other accused in the case after arrests were kept in the sub-jail of Vijayawada until the 7th April 1948, when they were transferred for some reason to the Central Jail, Rajahmundry. On the 10th and 11th April 1948, the District Magistrate of Krishna

under the authority delegated to him under S. 15 of the Madras Maintenance of Public Order Act (I of 1947) passed orders of detention against the petitioners and seemed to have also prepared the grounds of detention on the said dates. The detention orders, however were not given immediate effect as the applicants were already in judicial custody. The petitioners moved for bail in the District Court, Krishna, but they were unsuccessful; and thereafter they came up to this court and on 18–5–1948, the petitioners and others were directed to be released by Yahya Ali, J. on bail on their furnishing security each in his own bond for the sum of Rs. 500 with two sureties for each of the said accused for Rs. 500 for each surety to the satisfaction of the Stationary Sub Magistrate of Vijayawada. The applicants, in pursuance of this order, furnished the necessary bail and on 21–5–1949, they were released but immediately after their release, at the Central Jail, Rajamundry, they were arrested in pursuance of the orders of detention passed earlier by the District Magistrate of Krishna on the 10th and 11th April, 1948.

The District Magistrate forwarded the grounds of detention to the Government on 1–6–1948, which were received by the Government on the next day and the grounds of detention were served on the applicants in June and July 1948. They immediately submitted their representations to the Government in July 1948 and the Government seem to have taken a long time to send them to the Advisory Council which they did on the 14th March 1949. The matter is still pending, it is said, with the Advisory Council, and so no final orders were passed by the Government. These applications under S. 491 of the Code of Criminal Procedure were filed by the detenus on the 28th February, 1949.

The first contention urged on behalf of the applicants is that as there is a long interval of time between the date of their arrest on the 31st January 1948 and the passing of the order of detention under S. 2 (1) of the Act, it would not be said that the District Magistrate could have been satisfied that these applicants were acting in a manner prejudicial to public safety or maintenance of public order. The chief ground mentioned by the Government in the grounds served upon the detenus is the activity of these persons on the 31st January 1948 and the active part alleged to have been taken by them on that day in the conspiracy to attack the members of the Rashtriya Swayam Sevak Sangh. This activity of theirs, it is alleged, is not proximate enough to justify an order of detention under s. 2 (1) of the Act. The interval, it would be seen, between the occurrence on the 31st January 1948 and the order of detention is more than 2 months. The ground on which the order of detention was based is certainly within the purview of the Act and is such as would certainly justify an order of detention under s. 2 (1) of the Act. No definite period can be fixed so as to restrict the activity of the person which would be open for consideration by the detaining authority to pass an order of detention under s. 2 (1) of the Act; that must vary according to circumstances of each case. The incident and the occurrence which are complained of, if true, is certainly a serious one and must have endangered the public peace on that date. The District Magistrate would certainly be within his jurisdiction to pass an order of detention on a prejudicial activity of that description. Merely because there is an interval of more than two months between the date of the order of detention and the date on which the offences were committed we cannot hold that the period is unreasonable so as to make the activity remote so as to preclude the District Magistrate from taking it into his consideration. The delay between the date of receipt of the explanation and the date of sending the matter to the advisory Council has been in a way explained by the District Magistrate and we may also take notice of the fact that perhaps he was also busy in dealing with the then existing trouble on the Hyderabad border.

It was next contended that the order of detention was made with a view to circumvent the order of this court directing the release of the petitioners on bail. We had occasion to consider cases in which immediately after the order of release on bail was made the detaining authority proceeded to pass an order of detention under s. 2 (1) with a view to prevent the person concerned from regaining his liberty. In such cases no doubt the action of the detaining authority cannot be justified and in these circumstances it must be presumed to be mala fide; but in these cases the order of detention was passed by the District Magistrate long before the release of these petitioners was thought of. The order granting bail was passed by this court on 18–5–1948 and the District Magistrate passed the order of detention on the 10th and 11th April 1948 on the material which was then

available to him. No doubt, as he now explains in the affidavit filed before us, he thought that as the petitioners were already in jail it was unnecessary to give immediate effect to the orders of detention. When the applicants were released in pursuance of the order of this court, the District Magistrate in the interests of public peace gave effect to the orders of detention which were passed by him long ago and got these applicants rearrested and detained. We see no justification for inferring that the District Magistrate was actuated by the motive of circumventing or nullifying the effect of the order of this Court directing the release of the applicants on bail. He forearmed himself with this order of detention to give effect to it whenever occasion arose for its use. We see, in the facts of this case, no justification for applying the principle of the cases decided by us where we held that in certain contingencies the order of detention was mala fide; in this case we are perfectly satisfied that the District Magistrate acted *bona fide* in the matter.

The third contention that was urged before us was that there was considerable delay on the part of the Government in complying with the requirements of the Act. In the first place, it was said that the District Magistrate took considerable time in sending the grounds justifying the order of detention to the Government. The detention order was passed in April and the grounds were sent to the Government only in June. The grounds themselves were signed by the District Magistrate on the 10th and 11th April 1948; apparently he was under the impression that the grounds should be sent to the Government only after the persons concerned were arrested and the orders of detention were sought to be given effect to. We do not see anything wrong in this view which the District Magistrate must have taken and though it is obligatory under the Act to send the grounds forthwith, in the circumstances of this case we think that the delay on the part of the District Magistrate was not unreasonable or was not justified.

On behalf of the applicants it was suggested that the order of detention was the result of political animosity and was not *bona fide*. In justification of this contention reference was made to the grounds themselves which were served on some of the petitioners, particularly on Katragadda Rajagopal Rao. We do not see any basis for inferring from these grounds that the Government or the District Magistrate was actuated by political animosity to take action under the Act against these applicants. Further, if the detenus intended to rely upon this as a ground of attack they ought to have expressly stated so in the affidavit filed in support of these applications so as to give to the Government an opportunity to meet such an allegation and show, if possible, that their action was justified and was *bona fide*. We, therefore, think that this contention does not deserve any serious consideration.

Lastly, an interesting question was raised on behalf of the applicants namely that, as these applicants were in the Central Jail, Rajahmundry, on the date on which the orders of detention were passed by the District Magistrate, Krishna, he had no jurisdiction to take action under s. 2 (1) of the Act. Under s. 15 of the Madras Maintenance of Public Order Act, 1947, the power to take action under s. 2 (1) (a) of the Act was delegated to the District Magistrates and the Commissioner of Police, Madras. The order of the Government of Madras is contained in G. O. No. Ms. 907 dated 21st March 1947. It reads as follows:

> "In exercise of the powers conferred by s. 15 of the Madras Maintenance of Public Order Act, 1947, Madras Act I of 1947, H.E. the Governor of Madras hereby directs that the powers conferred on the Provincial Government by s. 2 (1) (a) of the said Act shall be exercised also by all the District Magistrates and the Commissioner of Police, Madras, *within their respective jurisdiction*."

From this order it is clear that the jurisdiction of the District Magistrate under s. 2 (1) (a) of the Act is confined to his ordinary jurisdiction namely, the district, while under s. 2 (1) of the Act, it is open to the Provincial Government to take action against a person wherever he may be in the presidency. The jurisdiction of the District Magistrates is confined to their respective jurisdictions. Under the Criminal Procedure Code ordinarily the jurisdiction of the District Magistrates is confined to the district. But what is the test on which the jurisdiction to act under s. 2(1) of the Act should be decided. S. 2 (1) of the Act after amendment of 1948 refers to the satisfaction of the detaining authority with respect to the particular persons that he "is acting" or is "about to act" or is "likely to act" in any manner prejudicial to the public safety or maintenance of public order. The District Magistrate, therefore, has to be satisfied on this question. The person concerned may be acting, or may be about to act, or is likely to act; and this must have

reference only to the person who is within the jurisdiction of the District Magistrate. If it is a case of acting, the acting as well as the person who acts must be within the jurisdiction. Even if the activity was outside the jurisdiction but the person is within the jurisdiction of the District Magistrate, the District Magistrate would have the power to take action under s. 2 (1) if the person concerned is about to act or is likely to act in a manner prejudicial to public safety; he is within the jurisdiction of the District Magistrate. In either case, it seems to be necessary that the person whose activity is in question must be a person within the jurisdiction of the magistrate taking action under s. 2 (1). This is emphasised also by a reference to the latter part of the section as the object is to prevent a person by an order of detention from acting in a manner prejudicial to public safety or the maintenance of public order. The District Magistrate is charged with the duty of maintaining public peace in the district which is in his charge. The power to make an order of detention with a view to prevent breach of the peace can only be with reference to the area which is in his charge, that is, the district. From these indications in the section, it is clear that the person whose activity is the basis for the order under s. 2 (1) and whose action is sought to be prevented under the section must be within the jurisdiction of the District Magistrate proposing to take action under s. 2 (1) of the Act.

Applying this interpretation of the section to the facts in these applications, it would *prima facie* seem that the District Magistrate of Krishna had no jurisdiction to make an order of detention under s. 2 (1) of the Act as on the date when the detention orders were passed these applicants were actually in the Central Jail, Rajahmundry (East Godavari District). But on a close scrutiny of the facts, it would be seen that this *prima facie* view of the case is not sound. Till 7–4–1948 these applicants were in the sub jail, Bezwada as under-trial prisoners in P.R.C. No. 1 of 1948, on the file of the Stationary Sub-Magistrate of Vijayawada. The trial of the case did not commence by that date and under s. 344 of the Code of Criminal Procedure, they must have been kept in remand which was being renewed every 15 days by the magistrate. For some reason the Stationary Sub Magistrate instead of keeping these persons in Bezwada Sub Jail sent them to the Central Jail, Rajahmundry. They have necessarily to be brought for further remand after the expiry of the 15 days and therefore they are for all purposes in the judicial custody of the Sub-Magistrate, Bezwada, though they were in the Central Jail at Rajahmundry. The applicants at that stage had no freedom of movement of their own and were subject to the control and direction of the Stationary Sub-Magistrate of Bezwada. It was open to him (the Stationary Sub-Magistrate, Bezewada) to have called them back at Bezwada in time when he wanted and therefore, practically for all purposes they must be treated to be persons within the jurisdiction of the Stationary Sub-Magistrate, Bezwada on that date. If this is the correct view of the situation on that date, it follows that the District Magistrate had undoubted jurisdiction, to take action under s. 2 (1) of the Act. A similar contention was considered by the Allahabad High Court in *Rex* v. *Tilak Raj* [1] though under a different section. Under the United Provinces Maintenance of Public Order Act, the power of extending an order of detention was conferred upon District Magistrates within their respective jurisdictions. In that case the original order of detention was passed by the District Magistrate of Muzaffarnagar and the accused were taken to the jail at the Muzaffarnagar. Subsequently they were transferred to the Central Jail at Agra where they continued in custody ever since. Agra was within the jurisdiction of a different District Magistrate. Notwithstanding the fact that the detenus were in a different district, the District Magistrate of Muzaffarnagar passed an order of extension, exercising the power under the authority that was conferred upon him by the Provincial Government exercising its powers of delegation. It was there pointed out that the detenu even though he was in another jail was held in that jail under the order of the District Magistrate of Muzaffarnagar and so he was for all purposes a prisoner of that District Magistrate. The District Magistrate at Muzaffarnagar alone had jurisdiction to revoke the order before the period fixed in it had expired and he had also the power to extend the period of detention. The principle behind this decision is that the custody of a person in jail is really the custody of that magistrate who has the power and the right to give direction regarding the custody of the prisoner. The physical presence of the person in a different jail would not affect the power of the magistrate to control the movements of the person. The Stationary Sub

1. [1948] A. L. J. 399

Magistrate, Bezwada in these cases held the judicial custody of these persons and the custody in the Central Jail, Rajahmundry, was subject to his direction and control. The temporary absence from Bezwada in such circumstances under the direction of the Stationary Sub Magistrate, Bezwada, cannot affect the power of the District Magistrate to act under S. 2 (1) of the Act. We are therefore of opinion that the District Magistrate of Krishna had authority to take action under S. 2 (1) of the Act notwithstanding the temporary absence of these applicants on the 10th April 1948 at Rajahmundry.

For all these reasons we think that no case has been made out for interference by this Court with the orders of detention passed by the District Magistrate, Krishna.

These applications are therefore dismissed.

N.T.R.

—

PRIVY COUNCIL

[Appeal from Lahore]

April 6, 1949

LORD OAKSEY, SIR MADHAVAN NAIR, SIR JOHN BEAUMONT & SIR MALCOLM MACNAGHTEN

BHAGWAN DAS

v.

THE KING

Cr. P. C. (V of 1898), S. 492—Government of India Act, S. 49 — Appointment of Public Prosecutor.

It is part of the executive authority of the Province to make appointments to the post of Public Prosecutor and therefore by reason of S. 49, Government of India Act, the Governor is entitled to appoint the Advocate General a Public Prosecutor.

L. Saunders, for Applt.

B. Sen & Miss Tyalji, for Respt.

JUDGMENT

LORD OAKSEY : Special leave to appeal was granted in this case without their Lordships being acquainted with the necessary documents, which were no doubt not available. Leave was granted limited to the question of whether or not the proceedings were valid having regard to the fact that the appeal was signed and filed in the High Court by the Advocate-General and not by the Public Prosecutor.

The relevant documents have now been produced before their Lordships, and the facts are as follows.

By the Government of India Act, 1935, it was provided by S. 55 that every Province was to have an Advocate-General. On 1st April 1937, the Government of India Act came into force. On 3rd April, 1937 a notification in the Gazette provided that in exercise of the powers conferred on him by S. 492 of the Code of Criminal Procedure, 1898, the Governor of the Punjab is pleased to appoint the Advocate-General of the Punjab to be a Public Prosecutor generally for the Punjab. On 5th April, 1937, two days later, Mr. Ram Lall was appointed Advocate-General. On 9th February, 1938, he was appointed a Judge. On 11th February, 1938, Mr. Sleem, the officer who filed the Appeal to the High Court in these proceedings, was appointed Advocate-General.

In their Lordships' view by his appointment as Advocate-General, he became a public prosecutor under the provisions of the notification in the Gazette of 3rd April, 1937.

In 1940 Mr. Basant Kishen was appointed an assistant to Mr. Sleem as Advocate-General, and by a notification in the Gazette on 11th November, 1940, he was appointed a Public Prosecutor.

Those are the relevant documents. In those circumstances, it appears clear to their Lordships that Mr. Sleem, the Advocate-General, was a Public Prosecutor and was entitled to file this appeal.

It was submitted on behalf of the appellant that under section 492 of the Code of Criminal Procedure, sub-section 1, which provides that "The Provincial Government may appoint, generally, or in any case, or for any specified class or cases, in any local area, one or more officers to be called Public Prosecutors", the Governor of the Punjab had no power to appoint the Advocate-General to be a Public Prosecutor under that section because the Governor was not the Provincial Government for that purpose.

The attention of counsel for the appellant was drawn to section 49 of the Government of India Act, 1935. He submitted that it was no part of the executive authority of a Province to appoint Public Prosecutors within the meaning of section 492 of the Code of Criminal Procedure and that, therefore, the Governor had no power under the provisions of section 49 of the Government of India Act to make this appointment.

Their Lordships are unable to accept this argument. It appears to them that it was a part of the executive authority of the Province to make appointments to the post of Public Prosecutor and that, the executive authority of the province being vested by section 49 of the Government of India Act in the Governor, he was entitled to appoint the Advocate-General a Public Prosecutor.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

—

Cr.R.C. No. 196 of 1948
Cr.R.P. No. 187 of 1948
November 24, 1948

RAJAGOPALAN, J.

Sappa APPALASWAMY
v.
THE KING

Essential Supplies Temporary Powers Act (XXIV of 1946), S. 7—Notification prohibiting transport—Transport, what is.

The 'term transport' in a Notification prohibiting transport of charcoal from one district to another without a permit does not exclude consignment for transport. Hence a consignor of charcoal who delivers to a common carrier for transport would be liable for contravention of the Notification.

Petition under Ss. 435 and 439, Cr.P.C., 1898, praying the High Court to revise the judgment of the Court of Session of East Godavary Division at Rajahmundary dated 12-11-1947 and passed in C.A. No. 145 of 1947, preferred against the judgment of the Court of the Additional First Class Magistrate of Rajahmundry dated 20-8-1947 and passed in C.C. No. 58 of 1946.

G. Chandrasekhara Sastry, for Petr.
Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The petitioner a dealer in charcoal in Rajahmundry, was convicted of having transported without permits 150 bags of charcoal on two occasions to P.W.1 at Bhimavaram in contravention of the notification issued by the Government under the powers vested in them by the Defence of India Rules. The offence was punishable under S. 7 of Act XXIV of 1946.

The evidence on record could leave one in no doubt on the question of fact, whether it was the appellant that consigned for transport these 150 bags of charcoal to be delivered to P. W. 1 at Bhimavaram, though the actual transport was to be by a public carrier, in a boat.

Virtually the only point raised in this petition by the learned advocate for the petitioner was that it was not the petitioner that actually "transported" the charcoal from Rajahmundry to Bhimavaram and that the consignment for transport which was all that was proved against the petitioner could not bring him within the scope of the prohibition issued in the notification and S.7 of Act XXIV of 1946. The expression "transport" was not defined either in the notification or in the Defence of India Rules or anywhere in Act XXIV of 1946. Though expressions in a penal statute have to be construed strictly, it should be clear from the terms of the notification that what was intended was prohibition of movements of charcoal from one district to another without the requisite permits. The ban was not intended to be imposed only on the person who actually carried the charcoal. Very often it would only be a public carrier that would be entrusted with the actual conveyance of goods from one place to another. I am unable to hold that a construction of the term "transport" in the notification should exclude "consignment for transport". The petitioner who consigned the goods intending them to be taken from Rajahmundry to Bhimavaram did transport the goods within the meaning of the notification, though the physical act of carrying was done in a boat propelled by the boatman.

On the evidence on record the petitioner was rightly convicted. The sentence is by no means excessive. The offence complained of was committed a number of months after the issue of the notification which should have been well within the knowledge of the petitioner as a regular dealer in charcoal.

The petition is dismissed.

N.T.R. — *Petition dismissed*

Cr. M. P. No. 1536 of 1949
October 19, 1949

SATYANARAYANA RAO, J.
On a difference between
HORWILL & BALAKRISHNA AYYAR, JJ.

In the matter of Devata Lakshminarayana a detenu in the Camp Jail at Cuddalore.

Devata LAKSHMINARAYANA
v.
THE KING

Maintenance of Public Order Act (Mad. Act I of 1947), *s.* 2 (1) (*a*)—*Supplying explosives to persons outside Province — Activity if within purview of Act — Abandonment of prosecution and detention*—Bona fides.

SATYANARAYANA RAO, J. agreeing with HORWILL J: *Where the grounds on which the detention order was based stated that the detenu had been clandestinely purchasing and importing from outside sulphur, graphite, salt-petre and potassium and smuggling them to communist camps in Hyderabad State,*

Held, *this activity could not be said to endanger the public safety and maintenance of public order in this Province and so was outside the purview of the Act.*

Where a prosecution under the Explosive Substances Act is initiated but is abandoned and the accused detained under Madras Act I of 1947, *such abandonment is evidence of the lack of* bona fides *of the Government in resorting to the provisions of Act I of* 1947.

Petition under S. 491, Cr.P.C. praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a Habeas Corpus for production before the High Court of the person of Devata Lakshminarayana, a detenu in the camp Jail at Cuddalore to be dealt with according to law and direct that he be set at liberty.

S. Krishnamurthy, for Petr.

N. T. Raghunathan for *Public Prosecutor* (*V. L. Ethiraj*), for Crown.

ORDER

HORWILL J.—The petitioner is said to have transported explosive substances, such as potassium chlorate, potassium nitrate, and sulphur from Bezwada to Jaggayapet. He was arrested on 1—1—1949 for having committed an offence punishable under the Explosive Substances Act (Act VI of 1908), but instead of being brought to trial for this offence, he was served on 30—1—1949 with an order of detention under Act I of 1947. Grounds of detention were served on

1—3—1949; and 9 days later a charge-sheet was filed against the petitioner and two others. On 17—3—1949, the petitioner made the usual representations, denying that he had any connection with communists, saying that he had always been a staunch supporter of the Congress Party and had contributed to their funds. These representations were sent to the District Magistrate by the Government for report; and three months elapsed before the District Magistrate sent in his report on 21—6—1949. The matter was referred to the Advisory Council on 4–7–1949, and no final orders have been passed; nor, we understand, has the petitioner or his co-accused been brought to trial.

In the grounds of detention only one ground is given for the detention of the petitioner, and that is the one with which he has been charged. It is said in the second paragraph

> "Due to the disturbed conditions in the Hyderabad State and the subversive activities carried on by Hyderabad State Communists, the Communists have infiltrated into Indian Union villages and contacted villagers, especially those on the border and engaged them to make surreptitious purchases of explosive substances useful for manufacture of gunpowder, country bombs, and other explosives of similar nature for furtherance of their acts of sabotage."

In the following paragraph it is said:

> "In particular he (the petitioner) has been clandestinely purchasing locally and importting from outside sulphur, graphite, saltpetre, and potassium and smuggling them to Communist camps in Hyderabad State."

The following short paragraph is much to the same effect:

> "There is information that he is clandestinely importing sulphur, graphite and other explosive substances and smuggling them for Hyderabad State Communists."

Perhaps the succeeding sentence may also be quoted:

> "He is a communist-sympathiser and is actively assisting the State communists in supplying ammunition."

The gravamen of the charge is thus that the petitioner was transporting explosive substances to the Communist camps in the Hyderabad State for the manufacture of gunpowder, country bombs, and other explosives in furtherance of acts of sabotage. The grounds of detention served on the detenu are intended to be of the nature of a charge, to which he can write an answer that is sent to the

Government for their consideration, as well as that of the statutory Advisory Committee. He cannot be expected to answer what is not in the charge; and he is entitled to rely on any defects in that charge, such as that it does not show how the acts committed by him endanger the peace and security of this Presidency. The grounds served on the petitioner do not show in what way the furtherance of communist activities in the communist camps of the Hyderabad State supplied by the petitioner would endanger the peace and security of this Presidency. The learned Public Prosecutor has asked us to read into the charge-sheet something that is not there and which can only be furnished by observations found in newspapers and from gossip and rumours of which he says we can take judicial notice. Speaking for myself, I have no personal knowledge, either from newspapers or otherwise, of the inter-relations between the communists of Hyderabad and the communists in the neighbouring Krishna District. Moreover, it would *prima facie* be very unlikely, from a reading of the grounds in the charge, even if all the allegations made therein were true, that the explosive substances were intended for use in the Krishna District. The articles, as above indicated, were transported from Bezwada, and it would have been the easiest thing in the world for the communists in Krishna District, strong as they are said to be by the learned Public Prosecutor, to have supplied the explosives direct to the communists in Bezwada and in other parts of the district. I cannot see the purpose of supplying the communist camps in Hyderabad with materials for use in Krishna District, and I am not at all satisfied that the Government meant to imply in their grounds of detention that the explosives were sent to Hyderabad for use in Krishna District. The defect in the charge is not therefore altogether a technical one.

Moreover, I think from the circumstances and from the manner in which this order of detention was served—if what has been said from the Bar is true—that there has been lack of good faith of the part on the Government. The petitioner, it is alleged, has committed an offence under the Explosive Substances Act which is punishable very severely, the maximum sentence being transporation for life, and since it would appear from what the learned Public Prosecutor has said that the Government have no intention or prosecuting this charge against the petitioner, it means that the Government have no trustworthy evidence on which to base their allegations.

For these reasons, in particular for the first reason, I am of opinion that the petitioner should be set at liberty forthwith.

Balakrishna Ayyar, J. This is a petition under S. 491, Cr.P.C. by one Devata Lakshminarayana, a detenu under Madras Act I of 1947. The substance of the allegations against him as set out in the grounds of detention is that "he has been clandestinely purchasing locally and also importing from outside sulphur, graphite, salpetre, and potassium and smuggling them to Communist camps in Hyderabad State". There is a further allegation that he is a Communist Sympathiser and "is actively assisting the State Communists in supplying ammunition."

The detenu denied these allegations.

The principal argument urged on behalf of the petitioner may be put in this form. Assuming for the moment that the allegations made in the grounds of detention are true, the export of these articles to Hyderabad might probably prejudice the maintenance of public order in that State; but disturbances in Hyderabad State would be of no concern to us here and would not affect or be prejudicial to the maintenance of public order within the limits of this Province. Madras Act I of 1947 is intended to deal only with the maintenance of public safety and the preservation of tranquillity in this Province. The Provincial Legislature cannot enact a law for the preservation of peace outside the limits of the Province. The Act applies only to this Province, and the preamble makes that clear. The allegations against the petitioner therefore fall outside the purview of the Act. This reasoning has one weak spot. It assumes that conditions in those areas of Hyderabad which border this province and to which State these articles are said to have been intended have no effect on the public tranquillity or the public safety in this Province, and that the Communists in Hyderabad do not cross over and create disturbances here. I do not feel that such an assumption would be right. There have been so many reports of disturbances in Krishna District which are attributed to the Communists of that District and of Hyderabad that I think we may take judicial notice of the existence of disturbed conditions there. As the Public Prosecutor pointed out, Krishna has been notified to be a disturbed area. Lawbreakers who use explosives are not likely to have much respect for formal political frontiers. It is true that the grounds of

detention do not make specific reference to these features, but that is possibly because it may have been assumed that the facts were too well-known to need mention. The argument urged on behalf of the petitioner might have been accepted if the consignment had been to a destination, so far away that disturbances there would have no effect on the tranquillity of this Province; but regard being had to the geographical proximity of Hyderabad State with this Province and that the boundary line between Krishna District and Hyderabad is one which is easily passed and re-passed, it would be impracticable to deal with questions of public safety and public order in Krishna District in complete isolation from conditions immediately beyond the border. Articles of the nature in which the petitioner is alleged to have been trafficking, might first travel across the border into Hyderabad and there be converted into more handy forms of explosives and be brought back for use here.

I perfectly agree that when there is a specific charge against an individual he ought normally to be prosecuted under the ordinary law, and that it would be dangerous to encourage the practice of simultaneously keeping a charge under the ordinary law pending over his head and also proceeding against him under one of these special Acts. The scope for abuse would be large and very often such a procedure may in itself be evidence of want of good faith. Here, we have the specific allegation that the petitioner was transporting explosives for delivery to the communists in Hyderabad, and I do not think that the contention of the Public Prosecutor that the case can be brought within the scope of Madras Act I of 1947 can be rejected. I do not therefore consider that the petitioner can legally claim that he should be released from his detention under this Act. I would dismiss the petition.

HORWILL & BALAKRISHNA AIYAR, JJ. As we differ in our opinion as to whether we should issue directions under S. 491 (1) (b) that the petitioner be set at liberty, it is necessary that this point should be referred to a third judge for his opinion; and we direct that the papers be placed before the Chief Justice for that purpose.

OPINION

As there is a difference of opinion between my learned brothers, Horwill, J, and Balakrishna Aiyar, J., this matter was placed before me under Cl. 36 of the Letters Patent. The matter arises out of an application under S. 491, Cr. P. C. by one Devata Lakshiminarayana who was detained under the Madras Maintenance of Public Order Act, 1947. The relevant dates and the grounds on which the detention was sought to be justified are set out in the judgment of my learned brother Horwill, J. and therefore it is not necessary for me to repeat them in this judgment. The learned Judges differed on two questions: Firstly, whether the grounds on which the order of detention is based are within the purview of the Act and even if true, are calculated to endanger the peace and security of this Province; secondly, whether or not there is lack of bona fides on the part of the Government in restoring to the provisions of the Act when the petitioner could have been, if the case for the Government were true, prosecuted under S. 5 of the Explosive Substances Act, 1908 (Act VI of 1908).

After anxious consideration I am of opinion that the view of Horwill, J. on the two points is correct. I had occasion to consider the object of the provisions of the Madras Maintenance of Public Order Act, 1947, requiring the Government to communicate to the detenu the grounds on which the order of detention has been made, I then said:—

> "Under the Act the liberty of the subject is curtailed without trial by courts established by law and the only safeguard provided by the Act for the detenu is the right to make a representation to the Advisory Council through the Provincial Government. This right is a substitute for a trial under ordinary law. In order to enable the detenue to present his case properly he should know the grounds and the particulars of the grounds on the basis of which an order for detention is made under S. 2 (1). The duty of providing this information was laid by the Act on the Provincial Government. The power conferred upon the Provincial Government of curtailing the liberty of the subject by the Act should, in my opinion, be exercised subject to the conditions and limitations imposed by the Act. It is the function of the court to see whether the conditions laid down by the statute are properly carried out or not. If they are not duly observed and fulfilled, the very foundation of the power to continue to detain the person comes to an end and the further detention becomes illegal. If the grounds furnished are no gronnds at all in the sense that they convey no infor-

mation to the person detained, or even if they are grounds *outside the purview of the Act*, the continuance of the detention cannot be justified. It may not be necessary that the Provincial Government should furnish legal evidence or proof of the accusations against the detenu, as in cases where he is charged with a crime, but the information furnished must be such which enable the detenu to present his case effectively''

Vide *Mani* v. *District Magistrate, Mathurai* [1].

The gravamen of the charge against the petitioner is, as pointed out by Horwill, J. that he had been clandestinely purchasing and importing from outside sulphur, graphite, saltpetre and pottassium and smuggling them to communist camps in Hyderabad State. If the object of the detenu is to supply the explosives to the communists in Hyderabad State, it is difficult to see how this activity of his is calculated to endanger the public safety and maintenance of public order in this Presidency. It is not permissible in a case of this description, in my opinion, to enlarge the scope of the grounds by inferences or by implications as it is in the nature of a charge which the detenu is called upon to meet. It should specifically and definitely be stated in the grounds the activity of the petitioner which it calculated to endanger public peace so as to justify an order of detention under the Act. I cannot import into the case my knowledge of facts and events acquired by me through other channels and it is not open to me to interpret the grounds in the light of such knowledge. The ground therefore is entirely outside the purview of the Act. No attempt is made in the grounds to show how the supply of the explosives to the communists in Hyderabad State would endanger the tranquillity of this Province. In the light of the principles laid down in the judgment of myself and Viswanatha Sastri, J. already referred to, I have no hesitation in holding that the order of detention on this ground cannot be justified.

I also agree with Horwill, J. that the fact that the Government had abandoned the intention of prosecuting the case initiated against the petitioner under the Explosive Substances Act is undoubted proof that the Government did not believe in the truth of the allegation now made. If the Government were really serious in the charge levelled against the detenue, they could have easily prosecuted him under the Act and his liberty would have been deprived not merely for a period as under the Madras Maintenance of Public Order Act but for a longer period, as under the Explosive Substances Act, the maximum sentence which could be awarded, if the guilt is established, is transporation for life. This conduct of the Government, in my opinion, affords a basis for inferring lack of good faith on the part of the Government. This Madras Maintenance of Public Order Act is not intended to enable the Government to deprive the liberty of a subject by first putting forward a case which they know fully well could not be substantiated in a court of law and then take advantage of the provisions of the Madras Act I of 1947 and detain the person in jail, as it is a settled fact that it is not open to this court in a proceeding under S. 491, Cr. P. C., to go into the truth of the grounds on which the order of detention is made. I agree, therefore, in the order proposed by my learned brother Horwill, J. that the petitioner should be set at liberty forthwith.

1. [1949] M.W.N. 549 : Cr. 141

* * *

ORDER.

In accordance with the majority opinion, the immediate relase of the petitioner is ordered.

N.T.R.

—

Cr. App. No. 748 of 1948

July 13, 1949

PANCHAPAKESA AIYAR, J.

C. V. RAJAGOPALACHARI

v.

THE KING

Press Emergency Powers Act (XXIII of 1931), s. 18—Offence under—Proof.

In prosecutions under s. 18 Press Emergency Powers Act, the prosecution need only prove that a document other than a newspaper has been intentionally made and published and that it contains either published news or comments on published news or any matter described in s. 4 (1) of the Act without obtaining the necessary permission of the magistrate under s. 15. The intention or motive in publishing the matters in such pamphlets is immaterial.

Appeal against the order of the Chief Presidency Magistrate, Egmore, Madras in C. C. No. 3244 of the Calendar for 1948 dated 27th December 1948.

Appellant in person.

Crown Prosecutor (S. Govind Swaminathan) for Crown.

JUDGMENT.

This is an appeal by one Mr. C. V. Rajagopalachari who has been convicted by the Chief

Presidency Magistrate under S. 18 of the Indian Press (Emergency Powers) Act 1931 for having published an unauthorised 'news-sheet' entitled 'Save the country from the totalitarianism', which is a pamphlet or tract of four pages without any cover. Copies of this pamphlet or news-sheet, he sent to the Prime Minister of India, the President, Indian National Congress, and also, according to him, to every Minister of the Congress Government in Madras and every prominent Congressman, besides public men and institution of standing; and also sent a copy to the "Baltimore Sun" in the United States of America. He enclosed copies of a prior pamphlet 'Creed and Camouflage in Congress Politics' when sending this second pamphlet. He has been sentenced to pay a fine of Rs. 250 and, in default, to rigorous imprisonment for six weeks. After an elaborate discussion, the Chief Presidency Magistrate rejected the appellant's contention that this pamphlet was not a 'news-sheet'. He found that the document in question was not a newspaper and did not contain public news or comments on public news but contained matters covered by S. 4 (1) (d) of the Indian Press (Emergency Powers) Act, that is, matters which tend directly or indirectly to bring into hatred or contempt, His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or excite disaffection towards His Majesty or the said Government, and would, therefore, constitute a 'news-sheet'. It is admitted by Mr. Rajagopalachari that he did not take any permission of the Magistrate to publish this pamphlet under s. 15 of the Act. Therefore, the only question that remains to be considered is whether this document will be an unauthorised 'news-sheet' punishable under S. 18. There is no doubt whatever that he made and published this pamphlet. But he contends that he is always publishing pamphlets, and that these will be 'books' and not 'news-sheets'.

The main point which falls to be determined when considering the question is whether the matters contained in this document will fall within the purview of S. 4 (1) (d) in which case, the conviction will be correct as this pamphlet is "a document other than a newspaper" within the meaning of S. 4 (1), whatever the case be with regard to the sentence. Mr. Rajagopalachari contended that his intention and motive in publishing this document was not to bring into hatred or contempt the Government, or the Congress, or the administration, or any class or section of His Majesty's subjects or to excite disaffection towards the Congress or the Government or anybody else, but only to make Congressmen think deeply over the principles and policies of Mahatma Gandhi and see that the Congress organisation is brought back to a state of strength and sacrifice as in its heydays. His contention is that, to achieve this object, he had to speak out whatever he felt, without fear or favour, and that the fact that he sent copies of the pamphlet to the Congress President and Pandit Jawaharlal Nehru, who wrote a letter thanking him for it, and to other prominent Congressmen, shows that his motive in writing and distributing it was the same motive as had actuated Mahatma Gandhi and is actuating some other Congress leaders in Madras Province and elsewhere to express strong and fearless criticism of the Congress and the Government. He contended that he was a staunch and veteran congressman and the secretary of the Civil Liberties Union and a back-bencher domocrat. He argued that an *intention* to bring the government into hatred or contempt was essential, as in the case of sedition, and relied on the ruling in *Public Prosecutor* v. *Subbiah Mudaliar* [1] and *Niharendu Dutt Majumdar* v. *King Emperor* [2] for this contention, and vehemently urged that the proper thing to do, if the prosecution was confident of its case that the contents of this pamphlet came under s. 4 (1) (d), was to prosecute him for sedition, under s. 124-A, I. P. C., and prove it to the hilt, in which event he would have produced books, documents and witnesses galore and proved the case to be misconceived and unsustainable. The learned Crown Prosecutor contends, on the other hand that there is no sedition charge in this case and that, therefore, there is no need to go into the question of the sustainability of a sedition charge based on the contents of this pamphlet, and that the main question here, since the intention to write and publish the pamphlet is proved, is whether the matters in this document tend directly or indirectly to bring the Government etc., into hatred or contempt, whatever the intention in writing and publishing those matters. I agree.

Here, we are not concerned either with the Congress or its alleged pristine purity or present alleged degeneracy, or with any attempts of the appellant or others at purifying it; we are only concerned with the fact

1. [1937] M.W.N. 175: Cr. 31
2. [1942] M.W.N. 417: Cr. 89 F.C.

whether this pamphlet contains matters falling under s. 4 (1) (d), and whether it will constitute an unauthorised "news-sheet".

After deep consideration, I agree with the learned Crown Prosecutor's view that the intention or motive in publishing the matters in such pamphlets is immaterial in the case of such prosecutions under s. 18, provided the matter is published intentionally and tends directly or indirectly to bring into harted or contempt the government of the day. Sedition is a major offence, and has to be proved strictly, and there are well known decisions like *Niharendu Dutt Majumdar* v. *King Emperor* [2] governing the question as to what constitutes "sedition", and I may freely admit that if this were a prosecution for sedition the evidence on record may be inadequate to convict the appellant. But the matter before me now is different. In my opinion, in prosecutions under s. 18 of the Indian Press (Emergency Powers) Act, the prosecution need only prove that a document other than a news-paper has been intentionally made and published and that it contains either published news or comments on published news or any matter described in sub-sec. (1) of s. 4 of the Act without obtaining the necessary permission of the Magistrate under s. 15. Sub-sec. (1) (d) of s. 4 does not mention anything about the intention or motive in publishing such words, etc., but simply says that the document in question should contain words, signs or visible representations which tend directly or indirectly to bring into hatred or contempt the government established by law, etc.

In other words, it is the *effect* of the contents of the document, the *objective aspect*, that is covered by s. 4 (1) (d), and not the intention or motive or *the subjective aspect*, or the *mens rea* in uttering or publishing those words, which would be material for a prosecution for sedition under s. 124-A, I. P. C. It is significant that s. 4 (1) (d) omits all the provisoes found in s. 124-A.

The next question is whether this pamphlet contains words which tend directly or indirectly to bring into hatred or contempt the government. After deep consideration, I am of opinion that it does, whatever be the motive or the intention of the appellant. The following passages from the document in question will make this clear. One passage runs:—

> "Congress Governments have failed to control the prices of commodities. They have not put down rich monopolists, but have given them full scope for looting the people. At the dictation of the rich hoarders, decontrol of prices of food grains and cloth have been effected. The result is the phenomenal rise in the cost of living and the suffering of the poor and the middle classes".

It is obvious that this passage tends directly or indirectly to bring the government into hatred or contempt. People already ground down by soaring prices, and 90% of them unable to understand the cause of the high prices or the economic laws or the laws of trade, will conclude from this passage that the high prices are due to the fault of the Congress Government and that the Congress Government have given full scope to rich monopolists for looting the people, and that they have decontrolled the prices of food grains, cloth, etc. at the dictation of rich hoarders.

Again, there is another passage, viz.:

> "Congress Governments have passed emergency laws to detain without trial people who agitate to better the lot of the poor. If anybody protests against the repressive acts of the Government he is dubbed as Communist or 'fellow traveller'."

In these times, when undoubtedly there are some people who agitate not to better the lot of the poor but to better their own lot, this passage will tend directly or indirectly to bring the government into hatred or contempt;

Yet another passage runs:

> "The Congressmen came to power by sacrificing the principles for which many suffered in the past. Now they are hand in glove with the reactionaries. And they are bent upon keeping the power in their hands at any cost. To achieve this object they will solicit anybody's co-operation and even put God to auction . . . . . In order to hide these facts from the public knowledge they make the communists the scapegoats."

This passage too will undoubtedly tend directly or indirectly to bring the government into hatred or contempt. There is the communist movement; it is an arguable question whether communists are to be detained or not without trial. To say that these are detained and made scapegoats of by the Government in order to hide their lust for retaining power cannot be said to be reasonable criticism or to be even objectively correct.

Another passage runs:

> "Whatever error our National Leaders may commit, they are immune from criticism. If any dare point out such errors, he

is condemned as an unpatriotic rebel and *consigned to jail*."

The last words show that the passage relates to Congressmen in Government, as, otherwise they cannot consign people to jail. This passage too, in my opinion, falls within the scope of s. 4 (1) (d).

Still another passage runs:

"Now they are trying to be in power by securing the support of a section of the people by calling them true patriots and giving them lands and jobs and detaining others who refuse to accept the leaders' policy as correct. This policy, if continued will drive the country to anarchy and chaos and will end in civil war."

This passage too will come within s. 4 (1) (d), as it too brings the government into contempt or hatred and will cause grave disaffection among the citizens and may promote the very civil war which the pamphleteer says he wants to prevent.

Another passage runs:

"Leaders get angry if any one asks whether they can make India strong and prosperous by constantly quarelling with Pakistan and by cajoling the Maharajas by making them Rajapramukhs and by paying huge sums as compensation to parasitic zamindars and inamdars, and playing with communal prejudices. The leaders and their faithful followers refuse to face these facts because they are suffering from communist and communist phobia. Their anti-communism is only helping the reactionary rich to exploit the helpless poor which is thwarting the path of peaceful progress."

This passage too, in my opinion, will fall within the scope of s. 4 (1) (d). Even objectively, one cannot agree that the quarrels with Pakistan are all of the India Government's making or are engineered by the Indian Government, or that the Maharajahs are cajoled by the government by being made Rajapramukhs (after foregoing their sovereignty!) or that zamindars and inamdars are given compensation to serve as parasites and hangers on and admirers of the Government (when the lands have been taken away from them and only such compensation as is considered reasonable by the Legislature elected by the people is awarded to them.)

Therefore, the pamphlet, taken as a whole and without tearing any statements made therein out of their context, tends directly or indirectly to bring the government (and not merely the Congress) into hatred or contempt, whatever be the intention or the motive of the appellant in publishing such opinions. Whether it is a "book" or not, it will, therefore, fall within the definition of a "news-sheet". No doubt, the appellant has been a congressman for 25 years, from 1—1—1921 to 1—1—1946, and has been also the Secretary of the Civil Liberties Union, and he seems to be fanatically convinced of the truth of his own observations in this document and might, as he contends, have merely followed the footsteps of the greater men inside and outside the Congress in publishing such seething and sweeping criticisms. But a Court of Law is confined strictly to the law governing the facts, and the effect or tendency of the facts contained in the offending pamphlet or document. Politicians exceeding the limits laid down by the law take the risk of being convicted for offences under the law, as they have been all through the ages. Nor can they ask courts dealing with a particular pamphlet under s. 18 to read all their prior pamphlets to see the purity of their motives and their burning desire to reform the Government or the land.

In the end, I confirm the conviction of the appellant. In the peculiar circumstances of the case, and seeing that the definition of "news-sheet" has not been made clear by any ruling of this Court, and that, according to the learned Crown Prosecutor, even big books will come under the definition "news-sheet", and that the accused urges that he never dreamt that this pamphlet would be considered to be a news-sheet and not a book, and that he wrote and sent it to prominent people and papers and institutions as several people, congressmen and others, have written pamphlets and books containing criticisms similar to the document now before me and have not been prosecuted, I reduce the sentence to a fine of Rs. 50, or, in default, one week's simple imprisonment.

N.T.R. — *Sentence reduced*

Cr. R. C. No. 353 of 1948
Cr. R. P. No. 323 of 1948
October 20, 1949

PANCHAPAKESA AYYAR, J.

M. MUNUSWAMI NAICKER
v.
P. KANNIAPPA NAICKER

Penal Code (XLV of 1860*), s.* 504—*Offence under—Ingredients.*

The gravamen of the offence under s. 504, *I.P.C lies in the utterer provoking the victim by his words to commit an immediate breach of the peace. That can only occur if he utters the*

words in the presence of the victim or has them conveyed to him by letter or messenger. Where the accused uttered the abuse in the absence of the complainant, he cannot be convicted under s. 504 unless he asked his hearers to convey it to the complainant.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the 1st Class Bench of Magistrates, Thiruvottiyur dated 22–11–1947 and made in S. T. No. 333 of 1946.

Askar Ali & A. A. S. Mustafa. for Petr.

S. Venkatachalam for B. C. Seshachalam, for Respt.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER

This is an interesting case. The First Class Bench Court, Thiruvothioor, discharged the respondent, Kanniappa, in a case under s. 504 I. P. C. The respondent abused the petitioner in obscene terms stating, "may his wife be ravished! May the hydrocele fellow (the petitioner is said to have hydrocele) be beaten till his hydrocele is blown to bits!" This abuse was uttered in the absence of the petitioner, but the people who heard the abuse, they were members of the Panchayat, conveyed it to the petitioner, Munuswami Naicker, who felt highly put out on hearing their report and felt like committing a breach of the peace but restrained himself with an effort.

The question is whether, in these circumstances an offence under s. 504, I. P. C. was or was not made out *prima facie*. Mr. Askar Ali, for the petitioner, urged with great vehemence that there is really no distinction between a man who utters such words to panchayatdars and asks them to convey the words to the petitioner and a person who sends such insulting words by letter to the petitioner and, that it has been held by the Bombay High Court, in *Silvester Vaz Louis* v. *Dias* [1] that if insulting words likely to provoke a person to breach of the peace are conveyed to him in a letter *by post* the man sending such a letter will be liable under s. 504, I. P. C. The learned Public Prosecutor agrees and I too agree. But the point here is whether the respondent not only uttered the abuse to the panchayatdars but asked the panchayatdars to convey it to the petitioner. If a man stands before another's house, or near where he is, and utters insulting words calculated to provoke a breach of the peace even in his absence and wants them to be conveyed to the man he abuses and waits there to see what would happen he will, in my opinion, be liable under s. 504, I. P. C. as such a message, by messengers, stands on even a stronger footing than a message by letter. But, as the learned Public Prosecutor has rightly urged, there is no evidence in this case to show that the respondent asked the panchayatdars before whom he uttered the insulting words regarding the petitioner to convey them to the petitioner. Such a request is, in my opinion, essential to make a *prima facie* case, under s. 504 I.P.C. As that is absent, the discharge was right. Mr. Askar Ali argues that if insulting words like these are uttered, and are conveyed to the person about whom they are uttered, they are likely to provoke a breach of the peace when the victim is told about them whether the utterer asks them to be conveyed to him or not, and would therefore, amount to an offence under s. 504. I cannot agree. If that were so, any defamatory words, like that a man's wife or daughter is immoral, will come under s. 504 I. P. C. even if they are uttered a thousand miles away, if they are conveyed to the man by some obliging friends; nor can the distance be a criterion. The gravamen of the offence under s. 504, I. P. C. lies in the utterer provoking the victim by his words to commit an immediate breach of the peace. That can only occur if he utters the words in the presence of the victim or has them conveyed to him by letter or messenger. Few sane persons will commit a breach of the peace on mere hearsay evidence of abuse, and without even verification. In this case, as there is no evidence to show that the utterer asked the panchayatdars to convey his insulting words, uttered in his absence, to the petitioner I am of opinion that the lower court's order discharging the respondent cannot be said to be illegal, incorrect, improper or irregular, or to have occasioned a failure of justice.

The petition deserves to be and is hereby dismissed.

N.T.R. — *Petition dismissed*

1. [1930] A.I.R. Bom. 120

Cr. R. C. No. 1035 of 1948
Cr. R. P. No. 975 of 1948
October 19, 1949
PANCHAPAKESA AIYAR, J.

M. ABRAHAM
v.
THE KING

Penal Code, (XLV of 1860), s. 341—Obstruction to vehicle—Offence.

Where the driver of a bus made his bus stand across the road in such a manner as to prevent another bus which was coming from behind to proceed further,

Held, *the driver was guilty under S.* 341, *I.P.C. though the driver of the obstructed bus and the passengers therein could have either got down from that bus and walked away or even proceeded in their bus in another direction.*

1942 *M. W. N.* 602 ; *Cr.* 146 : *I. L. R.* 1942 *Mad.* 696 distinguished.

1946 *M. W. N.* 666; *Cr.* 118 Followed.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Additional I Class Magistrate of Chingleput in C. C. No. 686 of 1947 dated 31—7—48.

S. Krishnamurthy & Vepa P. Sarathy, for Petr.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER.

This is a petition against the conviction of the petitioner under S. 341, I. P. C. by the Additional First Class Magistrate, Chingleput, and a fine of Rs. 50 imposed on him therefor.

The facts are briefly these. The petitioner was the first accused in C. C. No. 686 of 1947 on the file of the Additional First Class Magistrate, Chingleput. He was the driver of bus No. MDH. 787. The prosecution case is that, on 27—9—1947, he purposely made his bus stand across the Thirukkalikundram Road, at Chinglaput, near the Chowki post in such a manner as to prevent another bus, MDH 1167, which was coming from behind, to proceed further. When P. W. 1 the driver of MDH 1167, turned his bus to the right, to avoid and pass the petitioner's bus, the petitioner deliberately and intentionally drove his bus MDH 787 in a rash and negligent manner and dashed against bus No. 1167, causing damage, and thereby committing an act endangering the life of the passengers who were travelling in that bus. The learned Magistrate found this petitioner guilty only under S. 341, I. P. C. for wrongfully restraining the driver and passengers of Bus No. 1167, and sentenced him as stated above.

The learned counsel for the petitioner has contended before me that the petitioner would not be guilty of "wrongful restraint" by preventing the progress of the other bus MDH 1167, by putting his bus across the road, because of the observations of the Bench ruling in *Maharani of Nabha* v. *Province of Madras* [1]. I have looked into that ruling. It will not help the petitioner. It was mainly concerned with the question of "wrongful consignment", and not with "wrongful restraint", as here, though that question was also incidentally referred to by way of *obiter.* The learned Magistrate relied on the ruling in *Gopal Reddi* v. *Lakshmi Reddi* [2], a later judgment by Happell, J. and more or less a direct ruling on the point, on similar facts, and convicted and sentenced the petitioner.

I have perused the entire records, and heard the learned counsel for the petitioner and the learned Public Prosecutor *contra.* The first contention of the learned counsel for the petitioner was that the ruling of Happell J. in *Gopala Reddi* v. *Lakshmi Reddi* [2] was not correct, and that, since the driver of bus No. MDH 1167 and the passengers therein could have either got down from the bus and walked away in various directions, or got into the petitioner's bus and proceeded in the direction they wanted, or even proceeded in their bus in another direction, no offence was committed under S. 341. The argument is quite unsustainable. S. 339, I.P.C. says:

> "Whoever voluntarily obstructs any person so as to prevent that person from proceedig *in any direction in which that person has a right to proceed*"

wrongfully restrains that person. It is only regarding wrongful *confinement* that the person must be prevented from proceeding beyond certain circumscribed limits, i.e. prevented from proceeding in any direction beyond those limits. It is absurd to say that because the driver and the passengers of the other bus could have got down from that bus and walked away in different directions, or even gone in that bus to a different destination, in the reverse direction, there was, therefore, no wrongful restraint. Such a contention will make "wrongful restraint" under the I. P. C. infructuous and meaningless. Proceeding in any direction must only mean proceeding in that direction and not in any other direction, much less in the reverse direction. Nor can anybody be forced to get into the obstructor's bus and travel, which will be a kind of press-ganging system for the bus, not recognised by law.

The last contention was that the persons

1. [1942] M.W.N. 602 : Cr. 146 : [1942] I.L.R. Mad. 696
2. [1946] M.W.N. 666 : Cr. 118

were obstructed only if they went by the bus and not if they got down from the bus and walked along in the direction they wanted. It has been held by Happell, J. that this contention will not be of any avail and that any person travelling in a vehicle is entitled to travel in that vehicle, and should not be compelled to get down from that vehicle and walk or proceed in any other manner the obstructor wants. That is elementary commonsense. Suppose, for instance, four people are taking a corpse to the cremation ground, and they are obstructed regarding the corpse but would be free to proceed to the cremation ground after leaving the corpse behind, it is obvious that the excuse that, as they had liberty to proceed without the corpse to the cremation ground there was no obstruction, would be frivolous and unsustainable, as the very object of these persons proceeding to the cremation ground is to take the corpse with them there. So too, a man going in his car or bus to a destination intends to take the bus or car to that destination and should not be forced to convert himself into a veritable pedestrain trudging wearily all the way by the wrongful act of any obstructor.

This petition deserves to be and is hereby dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 812 of 1949
Cr. R. P. No. 750 of 1949
September 2, 1949
SOMASUNDARAM, J.

T. ETHIRAJULU NAIDU v. KING

Prohibition Act (Mad. Act X of 1937), *s.*4(1)(*a*) *–Possession of varnish by carpenter–Offence.*

A carpenter possessing varnish containing denatured spirit and which is not fit for consumption is not guilty of an offence under S. 4 (1) (*a*) *Prohibition Act.*

Petition under Ss. 435 and 439 Cr. P. C., 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the court of the Presidency Magistrates, Egmore, Madras, dated 18-3-1949 in C. C. 58 of 1949.

B. V. Viswanatha Aiyar & *R. Desikan*, for Petr.

G. Gopinath for the Crown Prosecutor, for Crown.

ORDER

The accused has been convicted by the Chief Presidency Magistrate under s. 4 (1) (a) of the Madras Prohibition Act and sentenced to pay a fine of Rs. 50.

The accused is a carpenter and in his carpentry shop a jar containing two gallons of varnish was found. This varnish contains denatured spirit and therefore it comes within the definition of liquor in the Act. The lower court finds that the liquid is not drinkable and is not fit for consumption. The question is whether the accused is guilty of an offence under s. 4 (1) (a) of the Act. The object of the Act, as the preamble shows, is to prohibit the consumption of intoxicating liquor. It is not suggested that the varnish is intended for drink or can be used for intoxicating purposes. Being a carpenter, the possession of varnish was for a legitimate use. P. W. 1 the Prohibition Officer, says that if it is varnish he would not have seized it. The finding of the lower court is that it is varnish. The Government have no doubt not exempted this from the purview of the Act. But the learned Crown Prosecutor, under instructions from Government, states that it is not the intention of the Government that there should be a prosecution in a case like this. Applying the principle of *de minimis non curat lex*, I hold that the petitioner should not have been convicted. I therefore set aside the conviction and sentence, and acquit the accused. The fine, if paid, will be refunded.

Since it is not the intention of the Government to prosecute carpenters for possession of varnishes, it is better they exempt it by appropriate notification.

N.T.R. — *Conviction set aside*

S. R. No. 13509 of 1949 — Criminal M. P. sought to be preferred to the High Court
November 4, 1949
PANCHAPAKESA AIYAR, J.

A. K. GOPALAN v. KING

Cr. P. C. (V of 1898*), s.* 561-*A—Appellant in Jail—Right to instruct counsel—Directions by Court.*

The High Court has power to safeguard the rights of parties before it in civil and criminal cases.

The High Court has power to allow an appellant in a criminal appeal, who is in jail, to have interviews and give instructions to his counsel for the purpose of his criminal appeal without the presence of any police officer and without

his instructions being taken down in short-hand, and subject only to the restrictions imposed by rule 430 *of the Madras Jail Manual.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to permit him to interview his advocates in Jail without the presence of a Police officer or direct the petitioner to be produced before the High Court to argue his Cr. App. No. 243 of 1948 preferred against the order of the Court of Session, North Malabar, in S. C. No. 23 of 1948.

A. Ramachandran for Row and Reddy for *Petr.*

S. Govind Swaminathan for Public Prosecutor for Crown.

ORDER

This matter arises from a petition under S. 561-A, Cr.P.C. filed by one A. K. Gopalan, convicted in S. C. No. 23 of 1948 on the file of the Sessions Judge, North Malabar, and sentenced to 5 years rigorous imprisonment. He has filed Criminal Appeal No. 243 of 1948 against that conviction and sentence, and that appeal is pending in this court. His complaint is that when his advocate went, on 25th August 1949, to interview him in Cuddalore Central Jail to take instructions from him regarding this appeal, a police officer of the C. I. D. Department insisted on being present at the interview and taking verbatim shorthand notes of what he was telling the vakil, and that all this is illegal and that if the C. I. D. officer takes such notes he would communicate them to his superior officers and to the counsel on the opposite side, thus breaking the rules regarding the confidential nature of such communications. He prays, therefore, that either this court should order, under S. 561-A, Cr. P. C. that no *police officer* should be present at the interview between him and his counsel when he instructs his counsel regarding Criminal Appeal No. 243 of 1948 or the other two appeals of his in the Sessions Court, Coimbatore and take notes of his instructions to his vakil, or in the alternative, that he be directed to be produced before this Court to argue Criminal Appeal No. 243 of 1948 in person. The learned Public Prosecutor objected that this Court has no powers under S. 561-A Cr. P. C. to grant either request as the Government had directed the C. I. D. Officer to be present at such interviews. He relied on a decision of Govinda Menon and Rajagopalan, JJ. in *Criminal Miscellaneous Petition No.* 1490 *of* 1949. I have looked into that ruling. It has no bearing on the requests in this petition regarding the interviews concerning the three criminal appeals. There, one Anandan Nambiar, a member of the Madras Legislative Assembly and a detenu under the Madras Maintenance of Public Safety Order, Act I of 1947 having no case or appeal in this court, prayed that the Superintendent of the Jail where he was detained should be ordered to produce him before the speaker of the Madras Legislative Assembly during the Assembly session to take part in the Assembly proceedings, even though he had received no notice to attend such proceedings, and to direct the Speaker of the Assembly to give him notice of the Assembly proceedings. Their Lordships held, and if I may say so with respect, correctly, that S. 561A Cr. P. C. had not given *increased powers* to a court which the Court did not possess before that section was enacted, much less *new powers* and that it only safeguarded and guaranteed the existence of those powers which the Court already possessed. Their ruling followed the ruling in *King Emperor* v. *Khwaja Nazir Ahmad* [1]. It is obvious that the requests made by Mr. Anandan Nambiar in the matter before their Lordships were quite outside the scope of this Court, having nothing to do with any matter or proceeding before it, and that no notice also had been given to him by the speaker of the Assembly to attend the Session, and it was not alleged that he was being wrongfully kept in ignorance of such notice, or that a notice actually issued by the Speaker was being wrongfully withheld from him and that he was being wrongfully prevented from attending the Assembly in obedience to such notice. But, in this case, the petitioner has filed an appeal in this court, which is pending, and has also two appeals in the Sessions Court, Coimbatore, and he has to be given by this Court all necessary facilities to instruct his counsel in those criminal appeals like any other appellant. So, the petitioner is asking this court only to exercise the powers of this court regarding appellants in cases before it, and concerning their right to instruct vakils without *a police officer* being present and taking verbatim shorthand notes of his instructions. Undoubtedly, this court has had the power to safeguard the rights of parties before it in civil and criminal cases, as laid down by law, ever since its inception, and those rights have been safeguarded and continued under S. 561-A, Cr. P. C. and this court ought to see that those rights are not infringed.

1. [1945] M.W.N. 49 : CR. 9 P.C.

Of course, those rights are subject to all the laws and rules governing the matter of interviews in jail. In fact, the learned counsel for the petitioner has no objection whatever to being made subject to rule 430 of the Madras Jail Manual and to have the interview in the presence of a *jail officer* who can be so placed as to be able to see and hear what passes between the petitioner and his counsel and to prevent any article being passed between the parties, as contemplated in rule 430 of the Madras Jail Manual. He only objects to *a police officer* being present and taking shorthand notes of his instructions. I consider his objection well founded. No court shall fail in its duty of allowing a party to give instructions to his vakil freely and frankly without *police officers* (who naturally represent *the other side*) being present and taking down shorthand notes of the instructions and broadcasting them thereafter to their superior officers, etc. There is also no rule shown to me under which an appellant before this court or before the Sessions Judge, Coimbatore, can be made, under mere *executive orders of Government*, to submit to the presence of a *police officer* at the interview between him and his counsel or to such police officers taking down shorthand notes of the instructions between the party and the vakil, obviously for intimating the instructions to his superior officers. I, therefore, direct the Superintendent, Central Jail Cuddalore, to allow the petitioner to have interviews and give instructions to his counsel for the purpose of his criminal appeals without the presence of any *police officer*, and without his instructions being taken down in shorthand and subject only to the restrictions imposed by rule 430 of the Madras Jail Manual and any other law or rule applicable to the case. A *jail officer* is quite different from a *police officer*. Many a *jail officer* drafts jail appeals for prisoners. Jail officers do not also represent *the other side* in criminal appeals. "Jail custody" and "police custody" are, it is well known, quite different. That is why the petitioner objects to the presence of a police officer while not objecting to that of a *jail officer*.

In view of my granting the prisoner's first request, there is no need to grant his second request which is only an alternative one.

N.T.R. —

Cr. R. C. No. 1222 of 1948
Cr. R. P. No. 1160 of 1948
October 13, 1949
PANCHAPAKESA AIYAR, J.

THE CALICUT HOSIERIES, CALICUT & others v. THE KING

Industrial Disputes Act (*XIV of* 1947), *Ss.* 23 & 24—*Madras Amendment Act* (*XII of* 1949) *S.* 5—*Effect of.*

A person charged with an offence of illegal lockout before the validating Act (Mad. Act XII of 1949) could not be convicted and sentenced for it, where the reference to the Industrial Tribunal was void before the validating Act. The intention of the amending Act is not to make persons charged with offences before the validating Act liable for those offences because of the validating Act, if they would not be liable without resort to the provisions of the validating Act.

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of Session, South Malabar Division, Kozhikode dated 4–9–1948 and passed in Cr. App. No. 46 of 1948 preferred against the judgment of the Court of the Sub Divisional Magistrate of Kozhikode dated 29–6–1948 and passed in C. C. No. 87 of 1948.

B. V. Subramanyam for Petr.

Asst. Public Prosecutor (*A. S. Sivakaminathan*) for Crown.

ORDER.

This is a petition by the Calicut Hosieries Ltd. (accused 1) and three Directors of that firm (accused 2 to 4) for setting aside their convictions under Ss. 23 and 24 of the Industrial Disputes Act XIV of 1947, read with S. 26 (2) for having declared and carried on *an illegal lockout* after a reference had been made by the Government of Madras to the Industrial Tribunal, Coimbatore, consisting of one person, *viz.* Sri C. R. Krishna Rao for deciding *certain* industrial disputes between *certain* hosiery factories in the Province of Madras and the workmen employed therein, and a letter of the District Magistrate of Malabar to the accused drawing their attention to the fact that all disputes between hosiery employers and workers had been referred to the Industrial Tribunal, Coimbatore, and that the lockout during the pendency of the reference was illegal and should be terminated.

The first petitioner firm has been ultimately sentenced to pay a fine of Rs. 1,000, and the directors of the firm (P. Ws. 2 to 4) have been sentenced ultimately by the appellate Court, to pay a fine of Rs. 500 each.

I have perused the entire records, and heard the learned counsel for the petitioners and the learned Public Prosecutor *contra*. The learned counsel for the petitioners urged that the reference in this case by the Government to the Tribunal was far too vague and general and was invalid under the rulings of Horwill and Rajagopalan, JJ. in *Ramayya Pantulu* v. *Kutty and Rao* (*Engineer*) *Ltd.* [1] and of the Chief Justice and Mack, J. in *C. M. P.* 3894 *of* 1949 a similar case but unreported*. The facts there being more or less identical with the facts here, it was urged that as the reference to the Industrial Tribunal, Coimbatore, itself was illegal and void, there could be no question of any *illegal lockout* by these petitioners during the pendency of that reference (which is as if it were not, being void and of no effect) or of any offence committed by them under the Industrial Disputes Act. The learned Public Prosecutor, while conceding that the rulings above have held such references, including a reference as in this case, to be illegal and void, and that the petitioners would have been entitled to an acquittal had the matters stood there, relied on S. 5 of Madras Act XII of 1949 for urging that the reference to the tribunal, held to be invalid by those two Bench judgments of this Court, has been validated thereby, even for making this lockout *illegal*.

S. 5 runs as follows:

> "Where, before the commencement of this Act, any Industrial Tribunal has been constituted by the Provincial Government under the said Act, all proceedings taken, all awards made, and all other acts and things done, whether before or after such commencement, by or before such Tribunal in connexion with any industrial dispute, shall be deemed to be valid and shall not be called in question in any court of law on the ground that the Tribunal was not constituted in accordance with the provisions of the said Act or the dispute to which the proceeding, award, act or thing relates was not referred to the Tribunal in accordance with such provisions."

It is clear from S. 5 that all acts and things done by or before such Tribunal in connection with any industrial dispute will be valid in spite of the previous void nature of the reference. In other words, if the Tribunal had passed an award under the reference in question in this case, it will be binding on all the parties. The amendment itself was made to make such awards rendered nugatory by the above decisions valid and binding and not to create retrospective offences a thing unknown to criminal law. It is quite futile to argue that any person charged with an offence of illegal lockout before the validating Act can be convicted and sentenced for it, where the reference was void before the validating Act. The second para of s. 5 itself declares that no decision or order of a Court which became final before the commencement of this Act shall be invalidated because of s. 5. That shows that there was no intention to declare the Bench decisions null and void and shows the clear intention of the legislature not to make persons charged with offences before the validating Act liable for those offences because of the validating Act, if they would not be liable without resort to the provisions of the validating Act. A criminal offence is a peculiar thing, and the law is very particular that only a person with the necessary *mens rea* or guilty knowledge at the time it was committed shall be convicted of a criminal offence and punished for it, except in very exceptional cases, of which this is not one. To say that because a reference has been validated, therefore a lockout which was *legal* before the validating Act has become *illegal*, though it would certainly not have been illegal but for the validating Act, is to ask for too much on the side of the prosecution. No Act is held to be retrospective regarding *crimes* in any civilized country without the clearest words to that effect.

The learned Public Prosecutor urged that this illegal lockout was committed before the decisions of the two Benches, and so the P.Ws. cannot avail themselves of these decisions. But it is obvious that courts only *declare* the law, which is deemed to have existed always, and that they cannot *create* a law when pronouncing judgments, much less *alter* it. Thus a person declared illegitimate by a court of law does not become illegitimate because of the decision of the Court on that day, or by an act of the court, but because he must be deemed to have been *always illegitimate*. In the same way, it must be construed here that the reference in this case was illegal and void even when it was

1. [1949] M.W.N. 143

* since reported in 1949 M.W.N. 819

made and even before the Court's rulings were issued proving it to be illegal and void and making it easy for all men to see it in the light of the reasoning given in those judgments. That being so, it is clear to me that these petitioners ought not to have been convicted in this case, and that they ought to have been acquitted, in the circumstances cited above.

I accordingly set aside the convictions and sentences on all the petitioners, and direct the fines, if paid, to be refunded to them.

N.T.R. — *Conviction set aside.*

Cr. R. C. No. 625 of 1948
Cr. R. P. No. 585 of 1948
August 3, 1949.
SOMASUNDARAM, J.

Chebrole NARAYANA
v.
Chendra RUDRAYYA

Cr. P. C. (*V of* 1898), *s.* 259—*Offence lawfully compoundable—What is.*

An offence which may be compounded with the permission of the court is an offence which may be lawfully compounded and an accused charged with such an offence can be discharged under s. 259, *Cr. P. C.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate of East Godavari at Kakinada dated 19—3—1948 and made in Cr.R.C. No. 9 of 1948 (C. C. No. 402 of 1949, Addl. 1st Class Magistrate, Rajahmundry.)

V. T. Rangaswami Iyengar & R. Santanam, for Petr.

C. Rama Rao, for Respt.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER.

On a private complaint the petitioner was prosecuted for cheating, an offence punishable under S. 420, I.P.C. The prosecution witnesses were examined and when the case was posted for hearing the complainant was absent and the trial Magistrate discharged the accused under S. 259, Cr. P. C. In revision the Additional District Magistrate set aside the order of discharge on the ground that though the offence may be lawfully compounded, still as the offence requires permission of the court for compounding (vide S.345, Cr. P. C.) and as such permission was not granted, it was not open to the Magistrate to discharge this petitioner.

The Additional District Magistrate is wrong in thinking that in cases where offences may be lawfully compounded, the accuser cannot be discharged under S. 259, Cr. P. C. without giving permission for compounding, What the section says is that in cases, where the offence may be lawfully compounded, the Magistrate may act in the manner mentioned in S. 259. The offence under S. 420, I. P. C. is one which under S. 345 may be compounded with the permission of the court and therefore an offence which may be lawfully compounded. The Magistrate will therefore be well within his rights to discharge by exercising his direction. But whether he exercised his direction properly or not is for the revisional court to go into and decide. As the grounds on which the further enquiry has been ordered are untenable, I set aside the order of further enquiry and direct the petition again to the heard on the question whether the trial court has exercised its discretion properly or not.

The revision petition will be heard by any Magistrate other than the Additional District Magistrate who heard the case.

N.T.R. —

[THE END]

General Index—1949

First number denotes pages of The Madras Weekly Notes Full Series

ARMS ACT (XI of 1878), S. 22—Delivery—What amounts to 451; 123

ARMY ACT (1911) Ss. 31, 41 & 69—Embezzlement of army property—Trial—Jurisdiction 349; 93

BORSTAL SCHOOLS ACT (Mad. Act V of 1926) S. 8—Scope of 14; 6 & 186; 58

CITY POLICE ACT (Mad Act III of 1888) S. 75—Scope of 572; 164

——S. 75—Binding over on conviction under 324; 92

COMPANIES ACT (VII of 1913), Ss. 132, 145 & 282—Ingredients—Liability of auditor and directors 175; 47

CRIMINAL PROCEDURE CODE (V of 1898) S. 106—Order when to be passed 324; 92 & 572; 164

——S. 145—Transfer to Magistrate without jurisdiction—Re-transfer—Validity 184; 56

——S. 146 (1)—Attachment under — Jurisdiction to order 115; 43

——Ss. 151 & 491—Arrest under s. 151—Habeas corpus 448; 120 & 547; 139

——Ss. 154 & 162—Police General diary Contents-Rough notes of statements to police—Use of 17; 9

——S 164—Statement under—Use of P.C. 444; 116

——S. 179—Offence under s. 465 I.P C.—Jurisdiction 452; 124

——S. 188—as adapted by Indian Independence Adaptation of Central Acts & Ordinances Order. 1948—Effect of 173; 45

——S 197—Applicability P.C. 442; 114

——Ss. 226 & 227—Sessions judge can alter charge 17; 9

——S. 259—Offence lawfully compoundable — What is 844; 222

——S. 307—Reference—Verdict of Jury—Interference 172 (2). 60

——Ss. 403, 436 & 437—Discharge for serious offence and conviction for lesser offence—Further inquiry 12; 4

——S. 411-A if *intra vires*—Criminal Procedure Code Amendment Act (XXVI of 1943) F.B 93; 21

——S. 414—Offence under Central Act XXIV of 1946 tried summarily—Appeal 280; 80

——S. 423 (1) (b)—Appellate Court ordering re-trial and trying itself—Legality 16; 8

——S. 439—Lacuna in prosecution—Additional evidence 450; 122

——S. 491 — Detention order — Jurisdiction of High Court 549; 141

——S. 491—Arrest under s 151 Cr. P. C.—*Habeas corpus* 484; 120

——S. 492—Appointment of Public Prosecutor by Governor P.C. 755; 207

——Ss. 494 & 347—Warrant case — Conversion into preliminary register case—Withdrawal—Effect 27; 19

——S. 511—Previous conviction—Proof 324; 92

——S 549—Non compliance with—Effect 349; 93

——S. 561A—Appellant in Jail—Right to instruct counsel—Directions by court 840: 218 (2)

CRIMINAL TRIAL—Medical witnesses—When to be examined 182; 54

——Witnesses resiling in Sessions Court conviction on 187; 59

DISTRICT MUNICIPALITIES ACT (V of 1920) Ss. 249 & 313—Order refusing licence — Prosecution—Jurisdiciion of criminal court to question legality of order 237; 61

ESSENTIAL SUPPLIES TEMPORARY POWERS ACT (XXIV of 1946), S. 2 (a)—Kerosene if essential commodity 514; 130

——S. 3—Orders under—Judicial notice of 103; 31

——S. 7—Notification prohibiting transport—Transport, what is 756; 208

——S. 7 (1)—G. O. No. 2660-A/45 dated 4-9-1945 prohibiting transport of paddy—Offence 632; 165

——S. 12—Summary trial—Appeal 280; 80

EVIDENCE ACT (I of 1872), S. 14—Criminal Trial—Evidence of prior offence—Admissibility P. C. 437; 109

——S. 24—Confession—Retracted—Conviction 281; 81

——S. 27—Admissibility under—Extent 512; 128

——S. 30—Statement of coaccused—Use of—P. C. 320; 88; 444; 116; 642; 175

——S. 45—Foot Print expert value of 634; 167

——S. 57—Control order—Proof—Jurdicial notice 103; 31

——S 133—Accomplice — Corroboration — Rule as to P C. 444; 116; 634; 167; & 642; 175

GAMING ACT (Mad Act III of 1930), Ss. 3. 6 & 8—Common Gaming house — Presumption — Ingredients under s. 8 15; 7

GENERAL CLAUSES ACT (X of 1897) S 3 (27a)—Orders under Essential Supplies Act are Indian laws 103; 31

——S. 6—Sanction and prosecution after repeal of Ordinance 250; 74

GOVERNMENT OF INDIA ACT, (1935), S. 49—Appointment of Public Prosecutor by Governor P. C. 755; 207

——S. 59 (1)—Detention order under Mad Act 1 of 1947—Signed by Chief Secretary—Valid 518; 134

——S. 100 (4)—Scope of F. B. 93; 21

——S. 103—Resolution of Governor acting under s. 93—Effect F. B 93; 21

——Sch. VII, List II entry 1—Scope of F. B. 93; 21

——Sch. VII, List II entry 2—Appeal in criminal matters falls under F B. 93; 21

INDUSTRIAL DISPUTES ACT (XIV of 1947) Ss. 23 & 24—Madras Amendment Act (XII of 1949), s. 5—Effect of 842; 220

LOCAL BOARDS ACT (Mad. Act XIV of 1920), Ss 194 (1) & 212 (II)—Applicability 546; 138

MAINTENANCE OF PUBLIC ORDER ACT (Mad Act I of 1947, S. 1 (4)—If *ultra vires*—Effect of 733; 185

——S. 2 (1) (a)—(before amendment)—Order of detention—Requirements 105; 33

——S 2 (1)—Detention to prevent getting out on bail—'Acting'—Meaning of 277; 77

——S. 2 (1) (a)—Supplying explosives to persons outside Province—Activity if within purview of Act—Abandonment of prosecution and detention—*Bona fides* 831; 209

——S. 2 (1)—Detention order—Interval between activity and order of detention—Order before release on bail—Bona fide—Jurisdiction of District Magistrate—Person in judicial custody of Subordinate Magistrate 751; 203

——S. 2 (1)—Form of Order—Order in respect of person arrested under s. 151 Cr. P. C.—Habeas Corpus application—Final order pending—Legal 547; 139

——Ss. 2 (1) & (2) 3 & 4—Order—Validity—Non-compliance with other provisions of Act—Effect 549; 141

——Ss. 2 (1) (a) & 15—Delegation by Provincial

Government—If government can pass order—Activity of person outside Province—If proper material 9; 1 & 509; 125
—Ss. 2 (1) (a) & 15—Mention of wrong section in order—Effect—Extention of Act—Prior delegation if enures—Order—Who should sign 518; 134
MAINTENANCE OF PUBLIC ORDER REMOVAL OF DOUBTS ORDINANCE (I of 1949)—Validity 733; 185
MOTOR VEHICLES ACT (IV of 1939), S. 116—Offence under 516; 132
PENAL CODE (XLV of 1860), S. 4 (1) & Cr. P. C. (V of 1898) S 188—As adapted by Indian Independence Adaption of Central Acts & Ordinances Order 1948—Offence in Acceding State—Trial in Province 173; 45
—S 104 & 105—Scope of 545; 137
—S. 161—Offence under—Prevention of Corruption Act (II of 1947). S. 4—Presumption under 649; 182
—Ss. 186 & 342—Firka Supply officer seizing paddy without authority—Locking in of officer—Offence—G. O. (Mis) 467 dated 15th June 1946 545; 137
—S. 338—Offence under 516; 132
—S. 341—Obstruction to vehicle—Offence 838; 216
—S. 406—Taking goods for a purpose—Retaining towards debts—Offence 631 : 184
—S. 409—Ceylon Penal Code, s. 392—Offence under P.C. 316 ; 85
—S. 465—Offence under—Jurisdiction 452 : 124
—S. 498—Takes—Meaning of 278 : 78
—S. 504—Insulting letter—Offence 323 : 91
—S. 504—Offence under—Ingredients 837 : 215
PRESS EMERGENCY POWERS ACT (XXIII of 1931) S 18—Offence under—Proof 834 : 212
PREVENTION OF ADULTERATION ACT (Mad. Act III of 1918), Ss. 3 & 18—Initiation of prosecution 571 : 163
—S. 5 (1) b)—Honey—Standard of purity not Prescribed—Adulteration—Offence 282 : 82
—S 20 (2) (f) & R. 27-A—Scope of rule 284 : 84
PREVENTION OF CORRUPTION ACT (II of 1947) S 4—Presumption under 649 : 182
—S 6—Sanction—Validity 450 : 122
PROHIBITION ACT (X of 1937) S. 4 (1) (a)—Possession of varnish by carpenter—Offence 840 : 218 (1)
PUBLIC HEALTH ACT (Mad Act III of 1939) S. 86—District health officer is local executive officer 571 : 163
WAR RISKS GOODS INSURANCE ORDINANCE (IX of 1949) S. 7 (2)—Repeal by Ordinance XXXIV of 1945—Prosecution after—Legality 250 : 74